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TRADE ASSOCIATION ACTIVITIES AND THE LAW

A DISCUSSION OF THE LEGAL AND ECONOMIC ASPECTS OF COLLECTIVE ACTION THROUGH TRADE ORGANIZATIONS

BY

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OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES

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TO MY MOTHER

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TRADE ASSOCIATION ACTIVITIES AND THE LAW

CHAPTER I

THE RULES OF COMPETITION

DEMOCRACY, in industry as in government, is the American ideal. Our laws regulating the conduct of business, have all been formulated to protect the individual trader, to encourage initiative, to preserve opportunity and to maintain for the public the great political, social and economic benefits which flow from a competitive system of industry.

Two rules of competition of great economic importance have been written into our statute books. The one prohibits all unreasonable restraints of trade. The other, supplementing the first, makes unlawful the use of unfair methods of competition. These two prohibitions, while modified and amplified by other statutes, embody the spirit and purpose of the federal regulation of business.

The Sherman Anti-Trust Act.—The Sherman Anti-Trust Act of 1890 broadly speaking prohibits all unreasonable restraints of trade.[1] The Act is comprehensive and reaches all such restraints regardless of the methods used to accomplish

[1] See Appendix A. The Act of July 2, 1890 (26 Stat. 209) contains two prohibitions. Section 1 is aimed at combined actions designed to restrict competition and declares unlawful every conceivable contract, combination or conspiracy which directly restrains trade. *Standard Oil Company vs United States*, 221 U. S. 1, 60; *Northern Securities Co. vs United States*, 193 U. S. 197. The existence of such a contract, conspiracy or combination may be implied from a course of dealing or other circumstances. *Frey & Sons vs Cudahy Packing Co.*, 41 Supreme Court Rep. 451; *Eastern States Retail Lumber Dealers' Association vs United States*, 234 U. S. 600, 608, 609 (1914); *American Column and Lumber Co. vs United States*, 42 Sup. Ct. Rep. 114, 117 (1921). Section 2 prohibits monopoly

them.[2] To determine the reasonableness or unreasonableness of a restraint of trade, it is necessary to consider the factors which naturally appeal to the reason as justifying or condemning the restraint. The extent, the effects, and the nature of the restraint, the methods by which the power to restrain was secured, the intention of the parties and the particular facts of the industry involved should all be considered, but basically the real and final test is whether or not the restraint, by reason either of the intent of the parties or of the inherent nature of the acts done or contemplated, suppresses or has within it the power to suppress competition to the public detriment.[3]

or any attempt to monopolize any part of interstate or foreign commerce and was intended to supplement the first section to make certain that the public policy embodied in that section could not be evaded. *Standard Oil Co. vs United States*, 221 U. S. 1, 60 (1911). It is a very important enlargement of the prohibitions of the first section in the following two respects: *First:* as is not generally understood, it applies to individual as well as combined action, while the first section applies only to contracts, combinations, or conspiracies, which require two or more parties. *Northern Securities Co. vs United States*, 193 U. S. 197, 404 (1904); *Standard Oil Co. vs United States*, 221 U. S. 1, 61 (1911). *Secondly:* it adds to the methods which are prohibited. The term monopoly, by legal interpretation, has come to have a synonymous meaning with the phrase "restraint of trade" in the first section. *Standard Oil Co. vs United States*, 221 U. S. 1, 61 (1911). The phrase "attempt to monopolize" is therefore construed to embrace any and all attempts of any nature to accomplish an undue restraint of trade, thus making the prohibition of unreasonable restraints of trade complete and all embracing. *Ibid.*, p. 61. There appears, however, to be a tendency on the part of the Supreme Court to distinguish between a monopoly acquired by combination and a monopoly acquired by individual action. In the case of a monopoly acquired by individual action, if no unfair or improper business methods were used in acquiring it, the court seems inclined not to hold such a monopoly a violation of the Act, although their decisions may be construed as holding only that there is no legal prohibition against individual action approaching monopoly so long as the control does not become so great as to have a dominating power over the industry. *United States vs United Shoe Machinery Co.*, 247 U. S. 32 (1918); *United States vs U. S. Steel Corp.*, 40 Sup. Ct. Rep. 293, 297, 298, 299 (1920).

[2] *American Tobacco Co. vs United States*, 221 U. S. 106, 181 (1911); *United States vs United Shoe Machinery Co.*, 247 U. S. 36, 69 (1918).

[3] *Nash vs United States*, 229 U. S. 373, 376 (1913); *Board of Trade of Chicago vs United States*, 246 U. S. 231, 238 (1917); *United States vs*

Extent of Restraint.—The extent of the restraint is of course an important factor in determining its unreasonableness. The restriction must be on a substantial part of the interstate commerce in the article, although it need be only a very small percentage of the total interstate traffic of the country in such product.[4] The phrase "any part of the trade or commerce among the several states or with foreign nations" affected by the act, has both a geographical and distributive significance, including both any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.[5] Therefore, monopolization of the trade of a single city directly affecting interstate commerce may be a violation of the act.[6] It is not necessary that the control or restraint should extend for a protracted period or beyond such a period as is required to bring in a new supply.[7] A control of a large percentage of the trade in an article is an indication of a violation and places upon the parties the burden of showing that it was acquired by lawful means.[8] In determining the extent of the control or restraint exercised, substitute materials which are only in a larger sense competitive are not considered nor is that portion of the production which is for the manufacturers' own use.[9] Lower grades, however, of the same material, which have the same uses and actively compete in the markets, should properly be considered in any estimate of the extent of control exercised.[10] To constitute a monopoly within the meaning of

Reading Co., 40 Sup. Ct. Rep. 425, 432 (1920); *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 88 (1912); *Harriman vs Northern Security Co.*, 197 U. S. 244, 291 (1905).

4 *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 88 (1912); *Montague vs Lowry*, 193 U. S. 46 (1904); *United States vs Whiting*, 212 Fed. 466, 474 (1914).

5 *Standard Oil Co. vs United States*, 221 U. S. 1, 61 (1911).

6 *Montague vs Lowry*, 193 U. S. 38, 45 (1904).

7 *United States vs Patten*, 226 U. S. 525; *United States vs Corn Products Refining Co.*, 234 Fed. 964, 1012 (1916); *Lee Line Steamers vs Memphis H. & R. Packet Co.*, 277 Fed. 5, 8 (1922).

8 *United States vs Eastman Kodak Co.*, 226 Fed. 62, 79 (1915); *United States vs Swift and Co.*, 196 U. S. 375, 391, 394 (1905).

9 *O'Halloran vs American Sea Green State Co.*, 207 Fed. 187, 193, 194 (1913); *United States vs American Can Co.*, 230 Fed. 859, 899 (1916).

10 *Bigelow vs Calumet & Hecla Mining Co.*, 167 Fed. 704, 730 (1908).

the act, the offending party must have a dominating proportion of the trade or a dominating power over the industry.[11]

Effect of Restraint.—The effect of the restriction is the most important element in determining reasonableness. The act was primarily adopted for the protection of the public rather than of individuals, and any injury to the public will condemn the restraint.[12] The fact that individual competitors of the parties to the restraint may be injured is added proof of its unreasonableness, both as to them and as to the public in whose interest it is to have the benefit of the initiative and competition of many independent tradesmen.[13] Our public policy requires the free, untrammeled operation of the law of supply and demand. Any substantial artificial restriction thwarting its natural operation so as to control or enhance prices or to control or limit production going into the normal currents of interstate trade, which of itself affects price and the convenience of the public in readily securing the article, is injurious to the public interest.[14] Likewise, any restriction tending to suppress competition by restraining the liberty of traders to engage in business or to transact their business in the ordinary and customary ways, is injurious both to such traders and also to the public.[15] Coercion of competitors, impairment of quality, oppression of labor and artificial depression of raw material prices are condemned. The effect of the restraint to make it unlawful must be substantial. It must be more than a harmless regula-

[11] *Swift and Co. vs United States*, 196 U. S. 375, 391, 394 (1905); *United States vs Reading Co.*, 40 Sup. Ct. Rep. 425, 432 (1920); *United States vs U. S. Steel Corp.*, 40 Sup. Ct. Rep. 293 (1920).

[12] *United States vs D. L. & W. Ry. Co.*, 238 U. S. 516, 534 (1915); *Wilder Mfg Co. vs Corn Products Co.*, 236 U. S. 165, 174 (1915); *Standard Oil Co. vs United States*, 221 U. S. 1, 58 (1911); *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 87, 88 (1912).

[13] *United States vs Trans-Missouri Freight Assn.*, 166 U. S. 290, 323 (1897).

[14] *United States vs Patten*, 226 U. S. 525, 542 (1913); *Loewe vs Lawlor*, 208 U. S. 274, 293 (1908); *United States vs Eastern States Retail Lbr. Dealers' Assn.*, 234 U. S. 600, 609 (1914); *United States vs Jellico Mountain Coal & Coke Co.*, 46 Fed. 432, 435 (1891).

[15] *Addyston Pipe Co. vs United States*, 175 U. S. 211, 244 (1899); *United States vs Trans-Missouri Freight Assn.*, 166 U. S. 290, 323 (1897); *Loewe vs Lawlor*, 208 U. S. 274, 293 (1908).

tion of competition, it must suppress competition or there must be in the existing control of the parties to the restraint the power to suppress competition.[16]

The nature of the restraint may likewise be relevant in ascertaining whether or not it is reasonable. The law prohibits only direct restraints of interstate commerce and does not concern itself with restraints which are merely indirect or incidental.[17] The degree of the restraint may also vary with its nature. A restraint may be voluntary or involuntary.[18] A voluntary restraint is one imposed by the parties of their own volition, in which event the unlawfulness will be dependent solely upon its effect upon the public. An involuntary restraint, on the other hand, imposes restrictions on competitors and may have added viciousness in its tendency toward the elimination of such competitors with the subsequent economic evils of monopoly. Then, too, the type of competition affected may have a certain relevancy. The law frowns upon any restraint which suppresses either actual or potential competition.[19] It is designed to protect both the market of the buyer and the market of the seller, and therefore, looks with disfavor upon restraints of competition either in buying or in selling.[20] Coöperative buying agencies, however, may have benefits to the public in the securing of

[16] *Board of Trade of Chicago vs United States,* 246 U. S. 231, 238 (1917).

[17] *Anderson vs United States,* 171 U. S. 615 (1898); *Swift & Co. vs United States,* 196 U. S. 375, 396 (1905); *United States vs Joint Traffic Assn.,* 171 U. S. 568 (1898); *United States vs Patten,* 226 U. S. 525 (1913); *Field vs Asphalt Co.,* 194 U. S. 618, 623 (1904); *United States vs Northern Securities Co.,* 193 U. S. 197, 402 (1904).

[18] *United States vs Patten,* 226 U. S. 525, 541 (1913); *Loewe vs Lawlor,* 208 U. S. 274, 293, 294 (1908); *Gompers vs Buck Stove & Range Co.,* 221 U. S. 418 (1911).

[19] *United States vs Colgate & Co.,* 250 U. S. 300, 307 (1919); *United States vs Reading Co.,* 226 U. S. 324, 369, 370 (1912); *United States vs Kissel,* 218 U. S. 601 (1910); *Thomson vs Union Castle S. S. Co.,* 166 Fed. 251, 253 (1908); *United States vs Union Pacific R. R. Co.,* 188 Fed. 102, 117 (1911); *Penn Sugar Refining Co. vs American Sugar Ref. Co.,* 166 Fed. 254 (1908).

[20] *Hard Rubber Co. vs U. S. Rubber Co.,* 229 Fed. 583, 587, 588 (1916); *United States vs Whiting,* 212 Fed. 466, 477 (1914); *Swift & Co. vs United States,* 196 U. S. 375, 399 (1905).

lower prices in turn affecting in a measure the question of reasonableness which a restriction of competition in selling would not have. Again, competition divides itself into competition in price, competition in quality, competition in terms and competition in service. A restriction of competition in service might, in some instances, be of benefit both to the industry and to the public. On the other hand, price is in a way the final expression of competition often including within itself allowances for the cost of other forms of competition and a restriction or control of competition in price, unless it be by some harmless restriction to establish the period of the day in which it would be effective, or possibly to prevent sales below cost, would be beyond question unlawful.

Methods Employed.—The methods by which the restraint or the power to restrain was attained may also have a certain bearing on the question of reasonableness.[21] It was not the purpose of the law to discourage efficiency and where the control was secured by the usual and normal methods of doing business, the courts are inclined to hold the acquirement of power not to be unlawful unless it is such as to be a dominating power over the entire industry.[22] But when the means used are of such a nature to justify the conclusion that they are not employed with the legitimate purpose of reasonably developing trade but are on the contrary done with the intent to do wrong to the public, and to limit unduly the rights of competition, they make the plan unlawful.[23] Therefore, it may reasonably be said that any act which is designed to injure the public by forcing an increase in price, or lessening their opportunity to secure goods and the like, or any acts fraudulent or coercive, which restrict the rights of competitors freely to do business, will be condemned as unreasonable and will make any plan of which they are a part, which hinders competition an unreasonable restraint of trade. Even usual and normal methods when used by a great organi-

[21] *United States vs Reading Co.*, 226 U. S. 324, 370 (1911); *United States vs Union Pacific R. R. Co.*, 226 U. S. 61 (1912); *Board of Trade of Chicago vs United States*, 246 U. S. 36 (1918).

[22] *United States vs U. S. Steel Corp.*, 40 Sup. Ct. Rep. 293, 297, 298 (1920); *United States vs Reading Co.*, 226 U. S. 324, 352 (1911).

[23] *Standard Oil Co. vs United States*, 221 U. S. 1, 58 (1911).

zation with monopolistic intent may become abnormal because of their far-reaching and certain effect in eliminating competition.[24] In doubtful cases, the normality of the method may depend upon the intent and the intent may be inferred both from the extent of the control secured and the methods used.[25] If the necessary result of the restraint is a material restriction of competition, intent is immaterial or at least is presumed.[26] If intent were essential to establish a violation of the law, it would be inferred from the extent of the control secured and from the methods used.[27] The intent of the parties becomes material only where there is a threatened rather than an accomplished restraint of trade. Then, although the restraint or the power to restrain may not yet have been secured, a knowledge of the intent may enable the court to interpret the facts and predict the probable attainment of the restraint, enjoining it at once for the protection of the public.[28] And proof of intent is essential in an alleged "attempt to monopolize" for there must at least be shown an intent in order to create a dangerous probability of the restraint resulting, which will warrant action of the court.[29] The alleged good intention of the parties will not be considered, for a good intention can not excuse a public injury.[30]

Facts Peculiar to Industry.—The facts peculiar to the par-

[24] *United States vs Great Lakes Towing Co.*, 208 Fed. 733, 744 (1913).

[25] *United States vs Reading Co.*, 226 U. S. 324, 370 (1911).

[26] *United States vs Trans-Missouri Freight Association*, 166 U. S. 290, 340 (1897); *United States vs Reading Co.*, 226 U. S. 324, 370 (1911); *United States vs Swift & Co.*, 196 U. S. 375, 397 (1905); *United States vs Patten*, 226 U. S. 526, 543 (1913); *United States vs Terminal R. R. Association*, 224 U. S. 383, 395 (1912).

[27] *Standard Oil Co. vs United States*, 221 U. S. 1, 75-76 (1911).

[28] *Board of Trade of Chicago vs United States*, 246 U. S. 231, 238 (1917).

[29] *United States vs Swift & Co.*, 196 U. S. 375.

[30] *Board of Trade of Chicago vs United States*, supra; *United States vs Great Lakes Towing Co.*, 208 Fed. 733, 744 (1913); *Thomson vs Cayser*, 243 U. S. 85, 86 (1917); *United States vs Motion Pictures Co.*, 225 Fed. 800, 808 (1915); *Eastern States Retail Lbr. Dealers' Assn. vs United States*, 234 U. S. 600, 613 (1914); *United States vs Standard Sanitary Mfg. Co.*, 226 U. S. 20, 49 (1912); *United States vs Union Pac. R. R. Co.*, 226 U. S. 61, 93 (1912).

ticular business or industry may also directly bear upon the fairness and the reasonableness of the restriction.

Where there is an unlimited supply of raw materials and only small capital is needed to engage in the business, the potential competition of others who would be attracted to the trade if high prices were charged, may be so complete a protection to the public that a restraint otherwise unreasonable might be held reasonable.[31] An agreement between persons engaged in quasi-public employments, monopolistic in character, might be held unreasonable on slighter grounds than an agreement between ordinary commercial competitors, against whom the competition of other parties might be effective.[32]

The Clayton Act.—The so-called Clayton Act of 1914 declares unlawful certain forms of price discriminations, exclusive or tying contracts, holding companies and interlocking directorates where their effect may be to substantially lessen competition or to tend toward monopoly. This act supplements but does not alter, except as it legalizes certain farmers' and labor organizations as such, the prohibitions of the Sherman Act. Its purpose was to prohibit those trade practices which Congress felt singly and of themselves were not covered by the existing Anti-Trust Acts, with the idea of arresting in their incipiency the creation of monopolies or unreasonable restraints of trade.[33] The Sherman Act in its practical application dealt almost entirely with consummated restraints; the Clayton Act defines and prohibits the specific methods, even though used by one individual, by which Congress felt unreasonable restraints of trade might be attained.[34] The test of lawfulness as to these practices is possibly more strict than the test of the Sherman Law. The Clayton Act is directed at the potential evils in these practices and the test is, therefore, not whether they unduly

[31] *United States vs American Can Co.*, 230 Fed. 859, 900 (1916); *United States vs Quaker Oats Co. et al.*, 232 Fed. 499, 502 (1916).

[32] *United States vs Whiting*, 212 Fed. 466, 475 (1914); But contra see *United States vs Prince Line*, 220 Fed. 230, 232 (1915).

[33] Report 698, Senate Committee on Judiciary, page 1, 63rd Congress, 2nd Session. For copy of the Act, see Appendix B.

[34] *United Shoe Machinery Corp. vs United States*, 42 Sup. Ct. 363 (1922).

restrict competition, but whether the probable effect of their use would be substantially to lessen competition or to tend to create a monopoly, or whether they place it within the power of the party using the practice to accomplish such a result.[35]

Price Discriminations.—Section 2 of the Clayton Act prohibits a discrimination in price in domestic trade[36] between purchasers where its effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. Prior to the passage of the Act, it had been a common practice of great concerns with a large distribution to sell their goods often below cost in territories served by their smaller competitors, recouping such losses by increased prices in non-competitive territory, thereby making it impossible for such competitors to continue in business regardless of their efficiency and the quality of their product.[37] There are numerous exceptions to this prohibition. Difference in price made because of differences (1) of grade, (2) of quality, (3) of quantity, (4) of cost of selling, (5) of cost of transportation, (6) or in good faith to meet competition are permitted. The seller is also given a free right to select his own customers in transactions which are bona fide and not in restraint of trade. Thus he has the right to make different prices to wholesalers and retailers or other general classes of customers in the absence of any purpose to restrain trade.[38]

Exclusive Contracts.—Section 3 makes it unlawful to make leases, sales or contracts for the sale of any commodity for use, consumption or resale in domestic trade or to fix a price to be charged for such commodity or to make a discount or rebate upon such price on the condition, agreement or understanding that the lessee or purchaser shall not use or deal

[35] *Standard Fashion Co. vs Magrane-Houston Co.*, 42 Sup. Ct. 360 (1922); see also *United States vs United Shoe Machinery Corp.*, 42 Sup. Ct. 363 (1922); see also 264 Fed. 138, 162-163; 234 Fed. 127, 150.

[36] *I.e.*, the United States or any territory thereof, the District of Columbia or any insular possession or other place under the jurisdiction of the United States.

[37] Report 627, House Committee on Judiciary, May 6, 1914, page 8, 63rd Congress, 2nd Session; W. H. S. Stevens, "Unfair Competition," Chapter I.

[38] *Baran vs Goodyear Tire & Rubber Co.*, 256 Fed. 570, 574 (1919).

in the commodities of any competitor of the lessor or seller where the effect of such practice may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

This practice, especially when employed by a large concern with a patented article or an established demand for its product which the dealer was almost compelled to supply, enabled such a concern often to exclude weaker competitors from many markets and was condemned by the Judiciary Committee of the House of Representatives as one of the "greatest instrumentalities of monopoly ever devised by the brain of man." [39] Proceedings have been brought by the Department of Justice, by the Federal Trade Commission, and by private parties under this section.[40]

Intercorporate Stockholding.—Section 7 prohibits the acquirement by one corporation engaged in interstate commerce of the stock in another competing corporation engaged in interstate commerce, or the acquisition by one corporation of the stock of two or more corporations engaged in interstate commerce which are competitors, where the effect of such acquirement may be substantially to lessen competition between such corporations or to restrain such interstate commerce in any section or community or to tend toward monopoly of any line of commerce. This provision does not apply to

(a) the purchase of stock solely for investment provided no attempt is made to use such stock to bring about a substantial lessening of competition, or to

(b) the formation of subsidiary corporations to carry on the natural legitimate business of the corporation or branches thereof even though all the stock is held by the joint company, provided the effect of such formation is not substantially to lessen competition, or to

[39] Report 627, House Committee on Judiciary, May 6, 1914, page 13, 63rd Congress, 2nd Session; Report 698, Senate Committee on Judiciary, July 22, 1914, page 8, 63rd Congress, 2nd Session.

[40] *United Shoe Machinery Corp. vs United States*, 42 Sup. Ct. 363 (1922); *Standard Fashion Co. vs Magrane-Houston Co.*, 42 Sup. Ct. 360 (1922); *Standard Oil Co. of New York vs Federal Trade Commission*, 273 Fed. 478 (1921); *Canfield Oil Co. vs Federal Trade Commission*, 274 Fed. 571 (1921).

(c) common carriers acquiring stock of other common carriers where there was no substantial competition between them.

The law thus recognizes the lawfulness of intercorporate stock holding for the ordinary purposes of business organization and development, but prohibits its use when effecting any substantial lessening of competition. The latter Congress viewed as an "abomination" and a "mere incorporated form of old-fashioned trust."[41] Of course, no more effective method of controlling and restricting competition could be devised than the control of a competitor's organization through ownership of its stock or a controlling interest in it. It is expressly provided that this section shall not be retroactive in its effect.

This Section has been qualified by Section 3, of the Webb Act[42] which legalizes the ownership by any corporation of the stock or the capital of any corporation engaged solely in export trade and organized solely for that purpose unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

Interlocking Directorates.—Section 8 prohibits so-called interlocking directorates and provides that no person shall be at the same time a director in any two or more industrial corporations,[43] any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 and which is engaged in whole or in part in interstate commerce, if such corporations are or have been so substantially in competition with each other that the elimination of competition between them by agreement would constitute a violation of any of the anti-trust acts. This section was designed to correct the far-reaching concentra-

[41] Report 698, Senate Committee on Judiciary, July 22, 1914, page 14, 63rd Congress, 2nd Session; Report 627, House Committee on Judiciary, May 6, 1914, page 17, 63rd Congress, 2nd Session.

[42] An Act to Promote Export Trade and Other Purposes, April 10, 1918, 40 Stat. 516, see Appendix C.

[43] Banks, banking associations, trust companies and common carriers are excepted from this specific provision, but a similar provision preventing interlocking directorates among banking institutions appears in the first paragraph of this same section and a somewhat similar provision applying to common carriers appears in Section 10 of the act.

tion of control in the hands of a few great corporations, the elimination of competition and other serious abuses effected by unity of management of any corporation through common directors. Another purpose emphasized in the committee reports [44] is perhaps best put in the following words of President Wilson in his message to Congress, Jan. 20, 1914, urging the adoption of this legislation:

> "It will bring new men, new energies, a new spirit of initiative, new blood, into the management of our great business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country."

Personal Liability.—By Section 14 of this act, violations of the penal provisions of the anti-trust acts by any corporation are deemed also to be violations by the particular officers, directors or agents who authorized the doing or did such acts and punishment by way of fine or imprisonment is provided. Various other important provisions appear in this statute not directly affecting the subject matter discussed in this chapter.

Exceptions.—There are three important exceptions to the Sherman Law. The first is embodied in the so-called Webb Act [45] enacted in 1918 to promote our export trade. It is therein provided that nothing appearing in the Sherman Law shall be construed as declaring to be illegal an association actually engaged solely in export trade or organized solely for such purpose or any agreement made or act done in the course of export trade by such association if (a) not in restraint of trade within the United States and (b) not in restraint of export trade of any domestic competitor of such association and if (c) such association does not in any way do any act whatsoever which either artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such

[44] Report 698, Senate Judiciary Committee, July 22, 1914, page 16, 63rd Congress, 2nd Session; Report 627, House Committee on Judiciary, May 6, 1914, pages 18, 20, 63rd Congress, 2nd Session.

[45] An Act to Promote Export Trade and for Other Purposes, April 10, 1918, 40 Stat. 516, see Appendix C.

association or substantially lessens competition or otherwise restrains trade within the United States. The use of unfair methods of competition by such an association against competitors engaged in export trade even though such acts are without the territorial jurisdiction of the United States is, however, prohibited.

The second exception appears in the proviso of Section 6 of the Clayton Act and provides that

> "Nothing contained in the Anti-Trust Acts shall be construed to forbid the existence and operation of labor, agricultural, or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

This exception passed as a result of political pressure exerted by labor and farmer organizations, was heralded by them as exempting them from the provision of the anti-trust laws. As a matter of fact, however, it has no such effect. Such organizations are legalized as organizations so that they may not be dissolved; but any such organization committing acts of a character violating the Anti-Trust Acts remains subject to the penalty of these laws.[46]

A third important exception embodying an entirely new method of regulation is presented by the Act of Feb. 8, 1922,[47]

[46] *Duplex Printing Co. vs Deering*, 254 U. S. 443 (1921); *Paine Lumber Co. vs Neal*, 244 U. S. 459 (1915); *United States vs King*, 250 Fed. 908 (1916); see The Status of Farmers' Coöperative Associations under Federal Law, *Journal of Political Economy*, vol. 26, 7, July, 1921, page 595 ff. A practical exception, however, appears in the appropriations act of 1914, 36 Stat. at Large, Chapter 1, page 53, making appropriations for the Department of Justice wherein it is provided that no part of the appropriations shall be expended for the prosecution of producers of farm products and associations of farmers who coöperate and organize in an effort to and with the purpose to obtain a fair and reasonable price for their product.

[47] Federal Statutes Ann.; Pamphlet Supplement, April, 1922, p. 1, Appendix D.

authorizing associations of producers of agricultural products. This law legalizes coöperative associations of this character, provided they are operated for mutual benefit and either allow each member only one vote or do not pay dividends in excess of 8 per cent annually, and provided they do not deal in the products of non-members to an amount greater in value than such as are handled for members. By implication, it frees such associations, although they may be engaged to a considerable extent in ordinary trade, from punishment for all restraints of trade, except those which result in an undue enhancement of price. Jurisdiction is placed in the Secretary of Agriculture to issue complaint, hold hearings, and issue an order to cease and desist, in the event such a restraint is practiced. Procedure is provided for appeal to the district courts. The effect of this statute is therefore to weaken the Sherman Law and to provide for an indirect method of price control by an administrative officer, subject to review by the courts.

Federal Trade Commission Act.—The Federal Trade Commission Act passed in 1914 declares unlawful the use of unfair methods of competition in interstate and foreign commerce.[48]

As changing conditions inevitably develop many novel competitive methods, Congress, in enacting the Federal Trade Commission Act, deemed it unwise to attempt to define the many variable forms of unfair competition; but made the general prohibition condemning all unfair methods, leaving it to the Federal Trade Commission, created by the Act, to determine, subject to review by the courts, the fairness or unfairness of specific practices as presented.[49] Unfair methods of competition divide themselves into two general classes. The first class consists of those competitive practices which are opposed to good morals because characterized by deception, bad faith, fraud or oppression; the second class are those which are unfair from an economic standpoint and against public policy because of

[48] 38 Stat. 717: Appendix E.

[49] Conference *Report* 1142, Sept. 4, 1914, page 19, 63rd Congress, 2nd Session; *Report* 597, Senate Committee on Interstate Commerce, July 13, 1914, page 13, 63rd Congress, 2nd Session; *Federal Trade Commission vs Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150, 154 (1922).

their *dangerous tendency* unduly to hinder competition or create monopoly.[50]

As to the first group of practices, the test of unfairness involves merely the application of the existing moral standards of society as to what is honest and fair.[51] There is a clear group of practices which the common judgment of business men and the public, condemn as fraudulent, dishonest or deceptive, and if any such act injures competitors, and operates to the prejudice of the public in any material way, it is unlawful.[52] Misbranding is a typical practice of this character.[53] Among the numerous methods of this type, which have already been condemned by the Commission, the following may be mentioned as typical: false advertising,[54] sale of adulterated products as pure,[55] the maintenance of bogus independent companies,[56] inducing breach of contract,[57] the payment of money to employees of customers to induce the purchase of goods,[58] espionage,[59] fraudulent demonstrations of competitive goods for purposes of disparagement,[60] deceptive imitation of competitive products,[61] false claims of patents,[62] the selling of old or rebuilt goods as new.[63]

[50] *Federal Trade Commission vs Gratz,* 253 U. S. 421, 427 (1919); *Federal Trade Commission vs Beech-Nut Packing Co.,* 42 Sup. Ct. Rep. 150, 154 (1922); *Sears Roebuck & Co. vs Federal Trade Commission,* 258 Fed. 307.

[51] *Curtis Publishing Co. vs Federal Trade Commission,* 270 Fed. 881, 908 (1921).

[52] *Federal Trade Commission vs Winsted Hosiery Co.,* 42 Sup. Ct. 384 (1922).

[53] *Ibid.*

[54] *Federal Trade Commission vs Silvex Co.,* 1 F. T. C. 301.

[55] *Federal Trade Commission vs Polomo Specialty Mfg. Co. et al.,* 2 F. T. C. 195.

[56] *Federal Trade Commission vs Fleischmann Co.,* 1 F. T. C. 119.

[57] *Federal Trade Commission vs Stanley Booking Corp.,* 1 F. T. C. 212.

[58] *Federal Trade Commission vs Arne Meyer,* 2 F. T. C. 107.

[59] *Federal Trade Commission vs American Agricultural Chemical Co. et al.,* 1 F. T. C. 226.

[60] *Federal Trade Commission vs Munzen Specialty Co.,* 1 F. T. C. 30.

[61] *Federal Trade Commission vs Block and Co.,* 1 F. T. C. 154.

[62] *Federal Trade Commission vs Gartside Iron Rust Soap Co.,* 1 F. T. C. 310.

[63] *Federal Trade Commission vs E. P. Janes et al.,* 1 F. T. C. 380.

As to the second group of unfair methods, the test of unlawfulness is whether the practice has a pronounced *tendency* to hinder competition unduly. The act is more comprehensive than the Sherman Act, for it not only covers combined action, but also clearly prohibits single acts by a single individual, which have a *dangerous tendency* to bring about the result prohibited by the Sherman Law. Intent need not be proved, nor is proof of a substantial effect in unduly hindering competition necessary, but only a reasonably clear probability of such an effect. Typical of practices, held to be unfair because of their economic effect in hindering competition, are attempts to control the channels of distribution,[64] resale price maintenance systems,[65] and the like. The following are suggestive of the types of practices condemned by the Commission because of this dangerous tendency to eliminate competitors and thus deprive the public of the benefits of free competition: boycotts and blacklists,[66] excessively high bidding to shut off competitors' supplies,[67] the purchase of competitors' goods from dealers to prevent their distribution or use,[68] and the like.

There seems to be a tendency also for the courts to hold that practices unfair to the public, such as agreements fixing prices, dividing territory, classifying customers, which suppress competition between the parties to them although they do not injure competitors, are within the jurisdiction of the Commission.[69] There must be an element of public interest involved to warrant action by the Commission. In the first class of practices

[64] *National Harness Manufacturers' Assn. vs Federal Trade Commission*, 268 Fed. 705 (1920); *Wholesale Grocers' Assn. of El Paso vs Federal Trade Commission*, 277 Fed. 657 (1922); *California Wholesale Grocery Co. et al. vs Federal Trade Commission*, 275 Fed. 725 (1921).

[65] *Federal Trade Commission vs Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150 (1922).

[66] *Federal Trade Commission vs Wholesale Saddlery Assn. et al.*, 1 F. T. C. 335; *Federal Trade Commission vs Western Sugar Refinery et al.*, 2 F. T. C. 151.

[67] *Federal Trade Commission vs American Agricultural Chemical Co.*, 1 F. T. C. 226.

[68] *Federal Trade Commission vs Fleischmann Co.*, 1 F. T. C. 119.

[69] *Texas Co. et al. vs Federal Trade Commission*, 273 Fed. 478, 482 (1921); see also *Federal Trade Commission vs Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150, 155 (1922).

the public interest would certainly be the protection of both the public and competitors against fraud or deception,[70] while as to the second class of practices, the public interest would appear when any method is employed which tends to restrain or eliminate the status of free, fair competition which the public policy of this country demands should be maintained.[71] In the latter type of practices in determining the tendency of the practice to hinder competitors unduly, such factors as the freedom of access of competitors to the consumer, the absence of monopoly, and the non-deprivation of the public of any right of facilities are elements properly to be considered.[72]

Probably to a considerable degree, the same sort of test applied in determining undue restraints of trade can be applied to determine whether or not a practice has a dangerous tendency to unduly hinder competition. If the act is employed to such an extent as to become a method, if its effect in hindering competitors from freely doing their business is substantial, if its nature is such as tend to eliminate or seriously embarrass competitors, regardless of their equal efficiency, such a practice is unfair from an economic standpoint.[73] Likewise there would seem to be equal reason for holding that if the intent of the party using the practice was clearly to unduly hinder the competition of his fellow traders, the law should apply regardless of whether or not the effect has been secured for the basic purpose of the law, as already stated, was to prevent at their very inception, practices which might tend to the undue restriction of competition.

Webb Export Act.—The Webb Export Act enlarged the jurisdiction of the Federal Trade Commission by providing that the prohibition against unfair methods of competition contained in the Commission Act should be construed as extending to such

[70] *Federal Trade Commission vs Winsted Hosiery Co.*, 42 Sup. Ct. 384 (1922).

[71] *Federal Trade Commission vs Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150 (1922).

[72] *Curtis Publishing Co. vs Federal Trade Commission*, 270 Fed. 881, 914 (1921).

[73] See *Sears Roebuck & Co. vs Federal Trade Commission*, 258 Fed. 307, 311 (1919).

methods used in export trade against competitors engaged in export trade even though the acts constituting such methods are done outside the territorial jurisdiction of the United States.[74]

Dumping Act of Sept. 8, 1916.—In the Revenue Act of September 8, 1916, the systematic dumping of foreign goods in this country at a price substantially below the actual market value or wholesale price of such goods in the country of their production at the time of their exportation is prohibited as unfair competition if done with the intent of destroying, injuring or preventing the establishment of an industry in the United States, or if such action restrains or monopolizes any part of commerce in such article in this country.[75]

Packers and Stockyards Act of 1921.[76]—One important limitation has been placed on the jurisdiction of the Federal Trade Commission. Under an act of Congress passed in 1921, the regulation of the competitive acts of the meat packers, with reference to transactions not only in meats and meat products, but also in dairy products, poultry and eggs, is taken from the Commission and placed under the direction of the Department of Agriculture. The prohibitions of this act are much more severe than the Federal Trade Commission Act. An anomalous situation, however, is created. Manufacturers and distributors of dairy products, poultry and eggs are subject to the jurisdiction of the Commission, meat packers engaged also in handling these products are subject only to the jurisdiction of the Department of Agriculture.

Summary.—It may be helpful to summarize briefly the conclusion of the writer as to what constitutes a violation of the laws regulating competition. So far as the Sherman Act is concerned, these principles may be stated.

First, the law prohibits any and all unreasonable restraints of trade. No subterfuge, no indirect method of accomplishing such a restraint, is knowingly condoned by the courts.

Second, the unreasonableness of a restraint depends upon its

[74] An Act to Promote Export Trade and for Other Purposes, April 10, 1918, Sec. 4, 40 Stat. 516.

[75] Act of Sept. 8, 1916, title VIII, Sec. 801; Fed. Stat. Ann. 1918 Supp., p. 571—see Appendix C.

[76] Fed. Stat. Ann. 1921 Supp., p. 287.

nature, its extent, its effect, and in some instances, upon the intent of those who impose it. Any concerted action which coerces competitors and seriously hinders their competition is unreasonable. The courts are zealous in their determination to protect individual traders from coercion, or interference, by concerted acts of their competitors. Any voluntary concerted action, which directly lessens competition between the parties in price, terms, quality or service, in a substantial way, is unreasonable. By substantial is meant, not a theoretical, but a considerable or material lessening of competition. In other words, the trade restrained must have substance, its volume must be of sufficient importance that the restraint affects enough persons to make action by the government really in the public interest. This does not mean that its effect must be nationwide. A restraint localized in a single city can be unlawful if it affects a material volume of interstate traffic. The trivial and the incidental indirect restraints such, for example, as the regulating of business hours, which are often compelled by the necessities of efficient business operation, and do not harm the public, are not condemned. But any action which conflicts with the public interest by increasing prices, deteriorating quality, restricting terms or eliminating necessary service on any considerable volume of goods in interstate commerce violates the law. If the intention of the parties to substantially lessen competition is clearly shown, the intent creates a dangerous probability of the restraint being accomplished, which will warrant governmental action before the effect on competition is procured.

To avoid possible violation of the Clayton Act, a business man should not discriminate in price between the same class of customers on the same grade, quality, or quantity, of the commodity sold, except when necessary to meet the price of his competitors, nor should he enter into any understandings with customers, express or implied, that they will not use or deal in the goods of competitors. If he desires to risk a possible violation of the law by the use of such practices, he should remember that when the effect of their use creates a *probability* that they will substantially lessen competition or tend toward monopoly a violation occurs. The use of these practices in any way is therefore dangerous. A corporation should not purchase

stock in a competing concern engaged in interstate commerce, where the effect of such acquisition will probably lessen competition between them. Nor should a person serve as a director for competing companies, one of which has a capital surplus and undivided profits aggregating more than $1,000,000 if they are so directly in competition with each other that an agreement between them to eliminate competition would amount to a violation of the Sherman Law.

Finally, it should also be borne in mind that competitive methods, which are fraudulent or deceptive, as well as methods which create a dangerous probability that competitors will be unduly hindered in the conduct of their business, or that a monopolistic control will be secured, are subject to certain condemnation by the Federal Trade Commission.

CHAPTER II

THE PURPOSE OF THE LAWS REGULATING COMPETITION

THE laws regulating competition are of large social, economic and political significance. They are badly misunderstood by the average business man whose direct contact with them usually occurs when they directly restrict his liberty of trade. The far-reaching indirect benefits of the legislation is seldom, if ever, brought to his attention. While primarily enacted to protect the public, to the overwhelming majority of business men, these statutes afford the only protection against coercion, oppression and possibly even the destruction of their enterprises.

Protection of Efficient.—The thought behind the Anti-Trust Acts is that a status of free, fair competition must be preserved as the foundation of trade and commerce in order that the survival of men in business shall be determined by their efficiency rather than by artificial factors.[1] This thought is expressed in the Corn Products case, cited *supra,* in the following language:—

"The means forbidden have been evolved, often empirically, because of the slow recognition that they make for the disorganization of industry and of the depression of a competing producing capacity which, if left alone could compete upon even terms. While the statute under this theory relies upon competition as a proper stimulus to the maintenance of industrial advance and as the chief protection to the consumer, it takes a long view, not a short. It recognizes that with

[1] *United States vs Motion Picture Co. et al.*, 225 Fed. 800, 802 (1915); *United States vs Corn Products Co.*, 234 Fed. 964, 1012, 1013, 1015 (1916); *United States vs United Shoe Machinery Corp.*, 247 U. S. 32, 47, 53, 56 (1917); *United States vs Reading Co. et al.*, 40 Sup. Ct. Rep. 425, 432; see also the able treatise by W. H. S. STEVENS on "Unfair Competition," p. 5.

the customer in the end must lie the decision between producers, and that those who fail to secure the market by the quality and cost of their service must pass out of the field but it does not identify permanent capacity with the inability to endure a transitory or local appeal to customers. Its presupposition is that there may well be competitors capable in the end of giving a service which will serve the public as well as their neighbors, who may yet succumb to concerted competition apparently more serviceable, but only because it is temporary, and is put forward with no purpose of universal application."

It appears to be the view of the courts that monopolies cannot be acquired and maintained by superior efficiency alone because capacity and ability is so generally distributed among mankind that its monopolization is a practical impossibility.[2] A similar position is taken by some of the leading economists of this country,[3] who maintain that no one concern can monopolize efficiency and that it is primarily the use of unfair methods and undue restraints which create and perpetuate monopoly. The law has no concern for the inefficient producer who is unable to meet the fair competition of his more efficient competitors; but it holds the public is entitled to the free play of industrial power and competitive efficiency which traders are able to develop, and improper restraints imposed on competitors are viewed as a social evil.[4] Magnitude alone acquired through efficient fair methods is not condemned.[5] Large scale production or the integration of non-competitive units is not objectionable for there is no purpose expressed in the Sherman Law to reduce manufacture to isolated units of the lowest degree.[6] The law intends that the honest efficient business man shall be

[2] *United States vs U. S. Steel Corp.*, 223 Fed. 51, 163; *Patterson vs United States*, 222 Fed. 599, 619 (1915); *Standard Oil Co. vs United States*, 221 U. S. 1, 55 (1911).

[3] See W. H. S. STEVENS, "Unfair Competition," Chap. 13: University of Chicago Press.

[4] *United States vs Corn Products Co.*, 234 Fed. 964, 1012, 1013, 1015 (1916).

[5] *United States vs U. S. Steel Corp.*, 40 Supreme Court Reporter, 293, 298; *United States vs United Shoe Machinery Corp.*, 247 U. S. 32, 56 (1917).

[6] *United States vs United Shoe Machinery Corp.*, 247 U. S. 32, 45 (1917); *United States vs Winslow*, 227 U. S. 202, 217.

protected from unfair and dishonest methods of competition or from combined action to restrain his trade. It intends too that the public shall have the benefit of the competition of all competitors who are efficient enough to survive, unrestrained by any conspiracy, combination or agreement. The legal application of the competitive theory is not the laissez faire economic theory of a merciless and wholly uncontrolled competition but rather that of a regulated competition preserving and protecting the efficient and guaranteeing to the public the benefits of competition between them. It abhors monopoly and is designed to preserve the spirit of democracy in industry by requiring that the good of the majority shall control.

Preservation of Individual Opportunity.—These laws are designed to preserve individual initiative and opportunity.[7] To quote the language of a Federal Court, they are based upon the inherent "right of every individual to choose his own calling in life and to follow the trade of his choice unhampered by any undue and any unfair interference from others."[8] The whole policy of the law is opposed to combined actions that "repress individual enterprise."[9] Perhaps in no other country is there such an opportunity to win business success and rise to the foremost ranks of society. Men with vision but limited capital are constantly achieving amazing success in industry. It would be an irretrievable loss to society were monopoly to become the rule in industry making every man a hired man.[10] In the Trans-Missouri Freight Association case, cited above, the Supreme Court of the United States long ago in discussing the economic changes forced by combinations in restraint of trade, emphasized this phase of the Anti-Trust Acts in the following language:

"It is not for the real prosperity that such changes should occur which result in transferring an independent business man, the head of

[7] *United States vs International Harvester Co.*, 214 Fed. 987, 1001 (1914); *United States vs Trans-Missouri Freight Assn.*, 166 U. S. 290, 323.

[8] *United States vs Motion Picture Co.*, 225 Fed. 800, 802 (1915).

[9] *Motion Picture Co. vs United States*, 193 U. S. 197, 341 (1902).

[10] See *United States vs Trans-Missouri Freight Assn.*, 166 U. S. 290, 323, 324; *State vs Standard Oil Co.*, 48 Ohio State 37.

his establishment small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no choice in shaping the business policy of the company and bound to obey orders issued by others."

The control of the futures of men and their descendants in the hands of a few men dominating our industries is unthinkable and its effect upon the initiative, ambitions and spirit of man, inconceivable. The progressive, broad-thinking business man of America can have no sympathy with a governmental policy legalizing monopoly.

Encouragement of Invention.—Consider also the effect of monopoly upon the inventor. The present laws afford a stimulus to and a market for inventive genius. The stern forces of competition have compelled business men to search for and adopt every means for reducing their costs and improving their methods of manufacture and distribution. The inventor has thus been assured of a strong market for his inventions. The effects upon society of the inventions employed by American industry in the past in increasing the productivity of capital, in improving the quality of products, in raising the standards of living of labor and consumer, is incalculable. If monopoly is to be the rule, what will be the result? Does the monopoly fortified by huge capital and absolute control of industry need to exert itself in a search of improvements of its products or its methods of manufacture? Not only would the inventor, under a monopolistic system of industry, find his market absolutely monopolized but also his sole possible buyer in a position where there would be no compelling need for the inventions he might have to offer. The tendency under such a system to stifle the inventive genius of the American people, of which we have been so proud and which has made such great contributions to the progress of American industry, is self-apparent.[11]

Protection of Producers of Raw Material.—Our public policy is also opposed to monopolies and restraints of trade because

[11] The British government, even in its joint research work with trade associations, is taking steps to see that trade combinations engaging in such work shall not impose on the rights of poor inventors, in order that inventions may be encouraged. See Report of the Committee of the Privy Council for Scientific and Industrial Research 1916-17, page 43.

of their power to depress the prices of raw materials to producers.[12] The power of a monopoly as the sole buyer of the available supply of raw materials would enable it to depress prices to such an extent that thousands of producers would be deprived of a fair profit for their product and held to the lowest price which would keep them producing. Public policy demands the protection of the millions of producers in this country and their rights to a fair, reasonable return for the products of their labor and capital. It can not permit any group arbitrarily to divert such returns to themselves.

Protection of Labor.—Perhaps to a lesser extent, the laws are designed to protect labor so that it shall not be universally handicapped in any effort to protect itself against the huge power of monopoly in order that the returns which would properly go to labor shall not be diverted artificially to the monopoly.[13]

Dangers of Unregulated Competition to Industry.—The danger to the individual from a total lack of regulation of competition on the other hand is equally as great as the legalization of monopoly. Were the government to lessen the restrictions of our Anti-Trust Laws, the business man would constantly find himself confronted by almost irresistible combinations taking away from him the management and control of his own business. Does he want to permit unlimited combinations among the producers of his raw materials who can dictate to him the price he shall pay and the portion of the supply that shall be allotted to him? Does he want it made lawful for labor unions to destroy his whole system of distribution by secondary boycotts against, and blacklists of any one who will buy from him? Does he want it made lawful for his competitors to persuade or coerce whole units of an industry to boycott him with impunity? Does he want to have associations of distributors dictate to whom he shall sell, the terms of sale and so on, as a consideration

[12] *United States vs International Harvester Co.*, 214 Fed. 987, 1005; *United States vs Whiting*, 212 Fed. 466, 477 (1914); *United States vs Keystone Watch Case Co.*, 218 Fed. 502, 518 (1915).

[13] *United States vs International Harvester Co.*, 214 Fed. 987, 1005; *United States vs Keystone Watch Case Co.*, 218 Fed. 502, 518 (1915); *United States vs U. S. Steel Corp.*, 223 Fed. 55, 61 (1915).

of his securing any business? Or if he is a wholesaler, does he want the manufacturers given a free hand to enter into any conspiracy to shut off his source of supplies and use their control of production to effect a boycott of the wholesaler by the retailer? Or do the retailers want to be in the position where they will be at the mercy of organizations of manufacturers or wholesalers so far as prices, terms, service and quality of the goods they sell, are concerned? All these restraints and many more have been attempted by various factions of American industry and prohibited under the Anti-Trust Acts. The lawyer who has really studied the history of the Anti-Trust Acts must be deeply impressed with the fact that they are an invaluable protection to the great mass of business men of this country. Surely it behooves any business man to consider with minute care any amendments designed to weaken the application of any laws regulating competition.

These laws even now, because of their incomplete enforcement, often fail to give him the protection to which he is entitled.

Underlying the whole legislation of course and the real cause for its enactment are broad conceptions of public policy demanding the protection of the general public from the many evils which flow from unreasonable restraints of competition.[14] These evils, it was felt, constitute a public danger, giving rise to serious social, industrial and political problems.[15]

Protection Against Enhancement of Price.—The almost certain effect of these laws in preserving competition is to lower prices or to prevent the enhancement of prices either through price agreements or limitation of production.[16] The severity of competition for business forces constant efforts to reduce costs by the employment of more efficient machinery, by the most economic use of labor, by the development of office and sales methods, by careful scrutiny of all expenses in order

[14] *Wilder Co. vs Corn Products Co.*, 236 U. S. 165, 174 (1915).

[15] *United States vs American Can Co.*, 230 Fed. 859, 901 (1916).

[16] *Standard Oil Co. vs United States*, 221 U. S. 58 (1911); *United States vs International Harvester Co.*, 214 Fed. 987, 1005; *United States vs U. S. Steel Corp.*, 223 Fed. 55, 61; *United States vs Keystone Watch Case Co.*, 218 Fed. 502 (1915).

to preserve a reasonable margin of profit. The result of such efforts in the absence of restrictive agreements is the maintenance of a lower level of prices than would obtain under a monopoly whose power to control prices would almost certainly be exercised to exact a monopolistic price.

Protection Against Depreciation of Quality.—Similarly the law demands the maintenance of competition free from all undue restraints in order to protect the public from deterioration of quality of the output of an industry.[17] The tremendous improvements in automobiles, for example, has taken place under the stimulus of the most severe kind of competition. A monopoly, on the other hand, in control of the market would not need to improve the quality of its product to retain its market. The public would have to be satisfied with the product offered and knowing of no improvements would naturally be satisfied with the product it received. It is no doubt true also that under competition the varying demands of different sections of the public for varying grades or quality of a commodity are more closely satisfied than they would be under a monopolistic system of industry.

Protection Against Depreciation of Service.—Again the laws are based upon the premise that competition assures better service to the public.[18] A monopoly can arbitrarily limit or eliminate the many forms of service which the public finds so attractive and convenient; but under the competitive system the action of some competitors in offering superior services to the public forces their competitors in turn to give such service. So, too, competition assures to the various classes of buyers the character of service they desire. The cash buyer desiring no service can satisfy his needs as readily as the buyer requiring credits, guarantees and what not. A monopoly in the absence of an effective potential competition can arbitrarily deprive the public of any service it deems inconvenient to give.

Protection Against Monopoly or Socialism.—The laws regu-

[17] *United States vs International Harvester Co.*, 214 Fed. 987, 1005; *United States vs U. S. Steel Corp.*, 223 Fed. 55, 61 (1915); *United States vs Keystone Watch Case Co.*, 218 Fed. 502, 518 (1915).

[18] *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 88 (1912).

lating competition have a deep political significance. To quote the Supreme Court of the United States:

"There are moreover thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth which though indirect are even more insidious in their influence and such as have awakened feelings of hostility which have not failed to find expressions in legislative acts." [19]

The powerful influence of great monopolies in their relationship to our government could easily develop a situation menacing to the preservation of the rights of citizens or even of our form of government itself. The ability of a monopoly to avail itself of the corporate form of organization with its guaranteed perpetual existence greatly increases the dangers of monopoly. A state court in discussing this fact has used this significant language:

"All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulations. . . . Freed as such bodies are from the sure bound to the schemes of individuals, the grave, they are able to add field to field and power to power until they become entirely too strong for that society which is made up of those whose plans are limited by a single life." [20]

Not only would the powerful influence of monopolistic combinations on the processes of government be dangerous to society, the reaction of the people against such a situation would also hold great possibility of harm to the industrial and political future of this country. The tremendous increase in Socialism the world over, the growing unrest and discontent is a warning to the business man, the man of capital. The spread of Socialistic belief is amazing and has encompassed great sections of the world. From time immemorial, as was adverted to by the Supreme Court in the Pearsall decision, there has been an innate

[19] *Pearsall vs Great Northern R. R. Co.*, 161 U. S. 646, 647.

[20] *Central R. R. Co. vs Collins*, 40 Ga. 582; *People vs Chicago Gas Trust Co.*, 130 Ill. 268.

dislike among English-speaking peoples to monopoly. Couple with this instinctive hostility a unification of industries in monopolistic units, and you have a situation which makes the transition to Socialism apparently a simple matter to the ordinary mind. It is on its face vastly easier for the state to take over the operation of an industry centralized and monopolized than to organize and operate an industry of many competing units. The present system of regulating competition is designed to preserve industrial democracy. The monopolistic system of industry would be the inevitable forerunner of Socialism.[21] The difficulties inherent in the regulation of monopoly would almost inevitably lead the masses of the people to believe that government ownership giving to the people directly or indirectly the benefits of all profit equally would be simpler than regulation preserving to very limited private classes the profits of industry. The certain way to bring about government ownership or Socialism in this country, with the power residing in the people to take such action if aroused to the belief that it is desirable, is to repeal the Anti-Trust Acts and permit monopolies to be attained. The present policy of state and federal government regulating competition is designed, on the other hand, to maintain "an equality of fortune among its citizens thought to be so desirable in a Republic."[22]

Dangers of Unregulated Competition to the Public.—If on the other hand effect on the public interests involved in the removal of all governmental regulation against restraints of competition be considered, the lack of wisdom of such a policy is apparent. It is of importance to the public and to the business man that those conflicts of massed units in industry which work harm on society should be prevented. The judicial history of the Sherman Law clearly shows that statute to be a reasonably effective measure in preventing and breaking up such situations. Were producers given the unlimited rights to restrain trade and achieve monopoly which the repeal of the Anti-Trust Acts would give them, the effects upon society in in-

[21] See address Hon. Joseph E. Davies, Chairman, Federal Trade Commission before Associated Advertising Clubs of the World, June 20, 1915.

[22] *State vs Standard Oil Co.*, 49 Ohio State 147.

creased prices would be appalling as is shown by the history of producers' organizations, which have acquired a complete monopoly of their product. Should the great farmer organizations of this country attempt to secure a monopoly of their product such as wheat or cotton, for example, the effects in increased prices, in misery to the lower classes, in bitterness between the farmer and other classes of society could scarcely be overestimated. Or were manufacturers and distributors given a freehand so far as restraints of trade are concerned, the clashes between the great branches of an industry striving for control of price, of terms, of quality, of methods of distribution bringing with them great openly organized systematic boycotts, black lists and so on, would until one or the other faction dominated the situation, cause grave artificial dislocations of the processes of manufacture and distribution and work the gravest hardship upon the public. Or were labor freed from all regulations as to restraint of trade, its power to paralyze industry could scarcely be over emphasized. It is the Anti-Trust Acts which have repeatedly prevented nationwide interference with interstate commerce, which threatened unparalleled injury to the economic life of the nation. These are not imaginary situations but situations which have been prevented or corrected by the Anti-Trust statutes. The artificial control of economic forces by great organizations in an industry, the conflicts between great units of industry, cannot be permitted without immeasurable harm to society.

Wastes of Competition.—But the most ardent believer in the competitive system on the other hand must admit that there are numerous wastes of varying importance resulting from competition. There is unnecessary plant duplication resulting in many industries in a producing capacity in excess of demand with a consequent waste of capital and a tendency because of increased overhead to prevent the competitive price from reaching the low level it otherwise would. There is a lack of knowledge of the basic facts of every industry compelling unintelligent and often ruinous competition which may result in an instability in production, in unsteady employment of labor and in violent price fluctuations in reality against the best interest of the public. There are beyond doubt uneconomic processes of

manufacture being utilized and unintelligent policies being followed and working harm to the industry because of a total lack of knowledge of costs. Small manufacturers often turn out a line of goods when a cost analysis would demonstrate that a specialization of their business would be more practical. There is often a freezing of capital through the absence of fixed standards in the industry, not only tying up capital in the manufacturer's warehouse and on the shelves of his distributors, but also confusing the buyer and sometimes operating to his injury. There is sometimes an incomplete development of the uses of products and a failure to utilize the by-products of an industry. The presence of a number of competitive units no doubt may tend to prevent the centralization of patents in such a way as to secure the uniform production of the best product by the most efficient methods. There is beyond question a great duplication of selling expense due to the duplication of advertising and selling efforts. There may be an inflation of credit due to intensive competition. There are also innumerable instances of gross frauds involved in competitive distribution. Our competitive system prior to the passage of the Webb Act may also have weakened American industry in foreign competition. These uncertainties and wastes, increasing the risks of business enterprises, it has also been contended, tend to keep much working capital from entering freely into ordinary industrial concerns, thus not only depriving the public of a steady market for the investment of its capital but also retarding the development of industry.[23]

But these evils in the main are not incapable of solution. Most of them can be greatly mitigated by proper lawful cooperation between members of an industry. It is the purpose of this treatise first to explain in as plain language as possible the legal rules governing competition and the many forms of concerted actions tabooed by the law as contrary to public policy, and secondly, to outline to business men the varied ac-

[23] For complete discussions of the defects of the competitive system, see JENKS AND CLARK, "The Trust Problem," Doubleday, Page and Company; CLARK, "The Control of Trusts," Macmillan & Co.; CROWELL, "Trusts and Competition," McClure & Co.; ELY, "Monopolies and Trusts," Macmillan & Co.

tivities in which, coöperating through their trade associations in complete compliance with the law, they can greatly lessen the economic wastes of competition, yet preserve for themselves and for the public the great benefits of competition as a regulating force in American industry.

CHAPTER III

FRAMING THE RULES OF BUSINESS CONDUCT

THE President of the United States in a recent address before the greatest of all American business organizations used this forceful language:—

> "If I were to bring one admonition to you, I would like to charge you men and women of influence and responsibility with the task of eliminating from American commerce those who do not have conscience, whose conscienceless practices bring that criticism which sometimes attends our American activities." [1]

The codification by the responsible business men of an industry of dishonest practices to be tabooed, if supported by the government, can be a powerful factor in ridding industry of such unhealthy conditions.

The ideals of men best project themselves into reality when crystallized in written documents. The barons of England when they forced a reluctant King to sign the great document known as the Magna Charta created a code of basic principles in government on which have developed the two greatest world powers of to-day. These principles restated and amplified in our Constitution dominate and control our whole system of government. The Bible is the great code of moral conduct for all Christian races. In every line of human activity, a united written expression of that which is best for the common good becomes a strong force for progress. The mere expression clarifies the general sentiment. The expressed judgment of men whom he respects powerfully influences the opinion and action of the individual.

Nowhere is a formulation of principles more needed than in business. Business represents perhaps the greatest field of

[1] Address of Warren G. Harding, President of the United States, before the Chamber of Commerce of the United States, May 18, 1922.

human activity. The law, always tardy in its expression of public sentiment, lags behind the ideas and ideals of the leaders of business. The business man's fear of the inflexibility and arbitrary administration of legislation makes him prone to avoid legal enactment as a means of correcting existing trade evils. A desire for complete freedom of action on the part of a few often prevents relief by action of an industry itself. As a result, more than one American industry is in a chaotic condition, —dominated as to some of its methods by an unscrupulous minority.

The overwhelming bulk of business men, like the great majority of men everywhere, are honest and public spirited. But human nature is human nature everywhere. In most industries there is a substrata of concerns which live by dishonest and unfair methods. They adulterate and misbrand their products, deceiving the public and retarding the demand of the public for the honest goods of their competitors. They advertise their products falsely, destroying the confidence of the public in all advertising. They employ bribery and other crooked means of making their sales, sometimes driving out of business competitors who will not follow their leadership. They shade grades, give secret rebates to favorite customers and in other ways undermine the integrity and stability of an industry. The force of such competition often compels the use by all of methods repugnant to the sensibilities of all right thinking business men and creates profound distrust between various branches of the industry. Although they represent but a small part of an industry the vicious, crooked competition of such concerns can have a most harmful effect upon an entire industry. The trade association offers the agency through which the forward-looking leaders of business can crystallize the conscience of their industry. Through the association united effort is possible to rid an industry of such practices.

The Statement of Principles.—The most common method has been the formulation of basic principles of business conduct by the association usually as a "code of ethics" or "code of fair practices." Such a code expresses the united judgment of the industry as to what is the fair, honorable way of doing business. One of the finest examples of such a code is the follow-

ing Fair Practices Code adopted by the Association of Ice Cream Supply Men in 1920, an infraction of which results in expulsion.

SECTION I

UNFAIR PRACTICES OF SELLER AS AGAINST BUYER

1. Misbranding of articles as regards the materials or ingredients of which they are composed, their quality, their method or place of manufacture or origin: "inferential" misbranding, *i.e.*, using trade names or descriptive terms which simulate trade names or descriptive terms of unadulterated or genuine goods.

2. Bribery of buyers or other employees of customers, with the payment of specified perecentages of the purchase price of all goods bought, with money, presents, excessive treats, etc., to obtain new business or to induce the continuance of patronage.

3. Commercial bribery of customers by money, long term credits not in keeping with trade custom, excessive entertaining or any other means.

4. False or misleading advertising concerning prices, advertiser's status as a manufacturer, methods employed in the advertiser's business, false claims to Government or other endorsements, etc., or any advertising, printed, written or oral that comes within the definition of "undesirable advertising" laid down by the National Association of Ice Cream Manufacturers.

5. Trade boycotts or combinations of traders to prevent buyers from obtaining goods through customary channels.

6. Sale of rebuilt articles as new products.

7. "Leader" selling—*i.e.*, selling one piece of goods at less than cost and recouping on others sold at the same time.

8. Making up and disseminating false cost sheets.

9. "Lottery" premiums—*i.e.*, giving or offering premiums of unequal value, the receipt of any particular premium to be determined by lot or chance.

10. Discrimination in prices between different purchasers or different localities, based upon other than legitimate cost, sales and delivery considerations.

11. Selling food, or a product to be put into food, which, because of its nature or method of manufacture, or for any other reason, violates a local, state or federal ordinance or law.

12. Consigning unordered goods to a possible buyer, with the hope that they will be used and paid for.

13. Distribution of samples of a better grade than the product they are supposed to represent.

14. Any wilful misrepresentation as to market conditions or supply, either as to finished products or raw materials, tending to induce buyers

to overbuy their requirements or contract for future deliveries to their plain loss or disadvantage.

SECTION II

UNFAIR PRACTICES OF COMPETITOR AS AGAINST COMPETITOR

1. Bribery of customer's employees to introduce foreign substances into a competitor's goods already purchased.

2. Tampering with or misadjusting goods sold by a competitor, for the purpose of discrediting him with a customer.

3. Bribery of competitor's employees or spying on competitor's plant, trailing of competitor's delivery and sales agents, bribing railroad employees for information about competitor's shipments, stealing or copying competitor's blue-prints, or any other means to the end of procuring a competitor's business or trade secrets.

4. Procuring breach, withdrawal or delay of competitor's contracts with customers by misrepresentation or by any other means.

5. Inducing competitor's employees to leave in such numbers as to disorganize, hamper or embarrass a business.

6. Making false or disparaging statements, either written or oral, respecting a competitor's products, selling prices, business, financial or personal standing, etc.

7. Threats of suits of patent infringement for selling or using alleged infringing products of a competitor, unless such threats are made in good faith.

8. Threatening to sue a competitor for the purpose of intimidation.

9. False claims to patents or misrepresentation of the scope of patents.

10. Simulating in one's own product the trade mark, trade name, cartons, slogans, advertising matter, or appearance of a competitor's product.

11. Converting raw materials of competitors to one's own use by diverting shipments through bribery, trickery or misrepresentation.

12. Depriving a competitor of transportation facilities through bribery of railroad employees, trickery, exercise of undue influence or any other means.

13. Refusal to accept advertising upon other than ethical grounds.

14. Threats to withdraw advertising unless competitor's advertising is excluded or unless certain discriminatory favors are granted.

15. Claiming or exercising a monopoly.

16. Obtaining estimates from competitors through bogus requests by a third party.

17. Threats to withdraw patronage from a firm supplying raw materials if same raw materials are sold to competitors.

18. Bidding prices of raw materials to a point where business becomes unprofitable, for the purpose of driving out weaker competitors.

19. Purchasing a competitor's unused goods, already sold, from a customer, and substituting one's own goods.

20. Threatening to force a competitor out of business unless he keeps out of certain territories.

21. Selling or offering to sell below cost or at less than a fair profit to force a competitor out of the field.

22. Making up and disseminating false cost sheets.

23. Payment of bonuses to jobbers' salesmen, with or without the knowledge of employers, for pushing of certain goods as against competitors' goods.

24. Giving away of goods, other than customary samples, in large quantities to hamper and embarrass competitors.

25. Combinations of competitors to raise or maintain or bring about uniformity in prices, to divide territory or allot customers.

26. Offering goods through second hands for less than their direct sales price.[2]

This movement for a codification of business principles has gone far beyond the bounds of single industries. In January, 1922, the Commercial Standards Council was formed, its members for the most part being officers of national business organizations.[3] The purpose of the Council is to crystallize business sentiment and stimulate efforts to eliminate questionable practices from American industry. An anti-bribery campaign is first being organized. The National Association of Credit Men whose members represent all branches of industry have adopted "Canons of Commercial Ethics" dealing with such matters as

[2] Other associations representing different branches of various industries have adopted similar codes. Among the many may be mentioned the following: National Commercial Fixtures Mfrs'. Assn., National Assn. of Building Exchanges, Associated General Contractors of America, United Typothetæ of America, Adopted 5th Annual Convention, 1891, and reaffirmed annually; National Hardware Assn., National Retail Monument Dealers' Assn., National Assn. of Ice Cream Manufacturers, National Assn. of Credit Men, National Assn. of Electrical Contractors and Dealers, and the Central Bureau of Dining Table Manufacturers. The Building Congress following the exposé of conditions in the building trades in New York, in December of last year, adopted a code setting forth in detail the judgment of the industry as to the duties of owners, bankers, real estate brokers, architects, engineers, contractors, material dealers and laborers in their several relationships. *Official Bulletin*, Heating & Piping Contractors' National Assn., Jan., 1922, p. 31.

[3] *Annals of the American Academy*, May, 1922, p. 221.

respect for contract obligations, honest advertising, the taking of unearned discounts, relations with professional men and so on.[4] The International Association of Rotary Clubs is conducting an international campaign for the writing of codes of business practice in all branches of business.[5] This campaign has aroused deep interest in a number of industries. One of the first efforts of the American Construction Council, in the organization of which over two hundred associations are expected to participate, will be the formation of a code of ethics acceptable to the industry and to the public. This great organization will endeavor to coördinate the efforts of the various construction industries, of the professional and labor organizations in these industries, and of the many groups whose products enter into construction. A statement of principles by so representative a group in so basic an industry ought to have a far-reaching effect throughout American commerce.

The International Chamber of Commerce in its convention in Paris in 1920 adopted a resolution urging the creation of a Bureau by each National organization to study questions relating to unfair competition and to prepare reports for the benefit of the Chamber. The Second Pan American Congress in 1920 adopted a resolution making a study of unfair methods of competition in international trade a part of its program of work.[6] Would not the formulation of what might be called a constitution of business by the Chamber of Commerce of the United States or some similiar organization supplemented and

[4] J. H. Tregoe, Secretary, *Annals of American Academy*, May, 1922, p. 208.

[5] Guy Gundaker, Chairman, Committee on Business Methods: *Annals of American Academy*, May, 1922, p. 228.

[6] New Phases of Unfair Competition and Measures for its Suppression, William Notz, *Yale Law Journal*, Feb., 1921, p. 384. The International Union for the Protection of Industrial Property with a membership embracing 22 countries in its meeting at Washington in 1911 adopted a provision whereby all the contracting countries agreed to assure to the members of the Union an effective protection against unfair competition. This obligation has on several occasions been recognized by the French and German courts. International Private Agreements in the Form of Cartels, Syndicates and Other Combinations, William Notz, *Journal of Political Economy*, October, 1920, p. 678.

fortified by the codes of our various industries particularly applicable to their conditions be a tremendous force working for better conditions in American industry generally?

There can be no doubt that the various codes of business principles adopted by many associations have had a great influence in improving business methods in this country. They have given the business man something definite on which to base the conduct of his enterprise. They represent one of the great achievements of the trade association movement. What could be finer than the action of the wholesale grocers' association vigorously opposing the cancellation by its members of contract obligations covering the purchase of sugar during the great break in the market when generally over the country there was an epidemic of cancellations.[7]

Lack of Control.—The weakness of any such codification, however, lies in the lack of means of enforcement. The power to control its membership gives an association a certain control over its own members. The Varnish Manufacturers expel members who violate the anti-rebate agreement entered into by every member as a condition of membership.[8] The American Wholesale Lumber Association which has adopted a rigorous code of ethics also demands a compliance with its provisions as a condition of membership.[9] But such measures control the members only and usually the offenders are not members of the association. An association can sometimes also use effective persuasive methods against the use of unfair methods by customers of its members, or by concerns from which they secure their supplies, but usually, to reach non-members, more harsh measures are necessary. The stationers have secured the elimination by manufacturers of some selling methods generally recognized to be unfair and unlawful.[10]

[7] See *Bulletin* National Wholesale Grocers' Assn., Sept., 1920, p. 2.

[8] Address, M. Q. Macdonald, Manager, Unfair Competition Bureau, Varnish Manufacturers' Assn., before the Paint Manufacturers' Assn. of the United States, Nov. 19, 1920, p. 11.

[9] By-laws American Wholesale Lumber Assn., Art. XI, Art. III, Sec. 9.

[10] Year Book, National Assn. of Stationers and Manufacturers, 1915, p. 7.

Federal Trade Commission.—To compel the elimination of the use of unfair methods by non-members as well as by members any association can now have the benefit of the coöperation of a governmental agency. A number of associations have quickly seized this opportunity. The Federal Trade Commission has, as already described in this volume, the power to prevent the use of unfair methods of competition.[11] An association, by filing a written complaint with the Commission can secure an investigation of any alleged unfair practice and if in the judgment of the Commission after full hearing such practice is an unfair method of competition, the offenders will be ordered to discontinue its use. In the textile industries several years ago deceptive branding of fabrics became so general that a number of associations determined to seek the coöperation of the government in correcting this evil. The Silk Association of America, with the coöperation of other associations, filed complaint with the Commission. An investigation was made and as a result a number of complaints were issued and orders issued against concerns which had been misbranding their products.[12] The paint and varnish industries by reason of uncontrollable conditions were faced with a situation where the bribery of purchasing agents, foremen and others having to do with purchases came near to being a prerequisite to the sale of their goods. Resolved to correct conditions which were repugnant to men in the two industries, they formed an unfair competition bureau which has coöperated vigorously with the Federal Trade Commission and other legal authorities in an effort to suppress the practice. This bureau has gathered proof of the use of this practice by individual concerns for submittal to the Commission, has organized support for the enactment of more effective legislation and has combatted the practice in every way possible. The shipping interests have formed an organization known as the American Ship Service Corporation which is also coöperating with the Commission in an effort to eliminate the

[11] See Chap. I, p. 14 ff.

[12] Address: Pure Fabrics Legislation, Horace B. Cheney. *Proceedings*, National Wholesale Dry Goods Assn., 1916, p. 25; Report of Committee on National Legislation, National Assn. of Cotton Manufacturers, *Proceedings*, 1916, p. 407.

custom of giving secret commission to captains, stewards, and others in connection with the sale of ship supplies.[13] The activity of these associations in cleaning up conditions in their industry with the coöperation of the government is one of the brightest spots in trade association history.[14] The wholesale grocers maintain a standing committee for coöperation with the Federal Trade Commission in the elimination of practices unfair to the wholesale grocers.[15]

Trade Practice Submittal.—To furnish a more effective method of coöperation with American industries, the Commission has recently adopted a new procedure known as the trade practice submittal. The purpose of this procedure is to eliminate simultaneously and by the consent of those engaged in the industry, practices which in the opinion of the industry as a whole are unfair. The Commission either on its own initiative or at the request of the industry calls a conference of the entire industry. The representatives of the industry draw up a list of the practices which they believe to be unfair. In some instances, questionnaires are sent to all the concerns in the trade to get a fuller expression of opinion. An earnest effort is made to secure a comprehensive composite judgment of all factors in the industry. These conclusions, the Commission takes for their informative value but does not of course regard itself as necessarily bound by them. The Commission of course could not in the slightest degree bind itself to accept without qualification the opinions of the industry for the business man's idea of what is unfair competition sometimes differs radically from that of courts and commissions. But a united expression of judgment by an entire industry cannot fail to have great weight with the Commission. If the facts presented lead the Commission to believe the elimination of such practices is in

[13] *Traffic World,* Jan. 8, 1921, p. 78.

[14] Report of M. Q. Macdonald, Manager of the Unfair Competition Bureau, at the annual meeting of the National Varnish Mfrs'. Assn., Nov. 16, 1920, and of the Paint Mfrs'. Assn. of the United States, Nov. 19, 1920, gives an idea of the wholehearted way these associations have handled this problem.

[15] *Proceedings,* Eleventh Annual Meeting National Wholesale Grocers' Assn., p. 218. The American Assn. of Woolen & Worsted Mfrs. also has a committee on unfair practices. *Textile World,* March 5, 1921, p. 92.

the public interests it issues a complaint against any concern which it has reason to believe from facts shown is using any of such practices.[16] Having behind it the support of the industry, the Commission is greatly strengthened in the event of any appeal to the courts from the order of the Commission. This new method of coöperation between industry and government in ridding industries of objectionable practices is the most constructive step yet taken in the regulation of business. When an agency is provided for group coöperation between the best-thinking and broad-visioned business men of an industry and the government real results should be attained. Unfortunately the existence of this method of procedure is not widely known. Trade practice submittals have, however, been employed in the butter, rebuilt typewriter, celluloid, petroleum, macaroni, book and writing paper, and condensed and evaporated milk industries. In some instances, very substantial results of lasting benefit have been secured.[17] This method of procedure furnishes an unusual opportunity for every industry to rid itself of these unfair and illegal practices which injure the reputation of its products and lower the morale of an industry. The real business men are given an opportunity to put their ideals of business practice in practical effect with the powerful support of the government.

Legality.—Unfortunately the idea of the codification of fair

[16] *Annual Report*, Federal Trade Commission, 1920, pp. 43, 46.

[17] *Annual Report*, Federal Trade Commission, 1920, p. 44; *Annual Report*, Federal Trade Commission, 1921, p. 32. Typical of these various conferences was that held with the Independent Oil Men's Association and the American Independent Petroleum Institute at which meeting the use of the following practices were condemned.

(1) False representation as to the actual value of a competitor's products; (2) attacking a competitor as to his financial standing, personal integrity, or ability to serve the trade; (3) condemning a competitor because of the size of his business, either large or small; (4) advertising so as to imply that competitors are not selling good products; (5) misrepresenting or misbranding of any petroleum products; (6) all forms of secret rebates or settlements whereby books and accounts can be so manipulated as to cover up the actual conditions; (7) commercial bribery; (8) making of contracts with ultimate consumers or users of oils, gas, etc., at a fixed price guaranteeing against an advance and protecting against a decline; (9) tank-wagon or service station sales on a credit basis.

and unfair business practices which has in it so much of possible benefit to an industry, has repeatedly been grossly abused. So-called codes of ethics have often been used to restrict competition and to control the channels of distribution. Any such use is of course a violation of law.[18] The most common violation has been in the adoption of rules designed to prevent direct or so-called irregular selling. An association code containing rules designed to restrict competition unreasonably amounts to an agreement or conspiracy in restraint of trade. No code should deal with any of the prohibited forms of associated activities discussed hereafter. In view of the fact that the business man sometimes feels that some severe but lawful form of competition is unfair, no code of business practice should be formulated without the advice of a lawyer skilled in the interpretation of the anti-trust laws.

There can be no doubt that the definite codification of business ideals of an industry has the most far-reaching effects. The approval of methods which are fair, the condemnation of practices which are unfair tends to stabilize business methods and to eliminate practices which destroy the morale of an industry. Such action tends to quickly establish trade customs instead of leaving their formation to the slow processes of evolution from countless business transactions. The coöperation of the government gives to the broad-visioned leaders of an industry effective aid in establishing the clean, fair, commercial conditions for which they have long been striving. Surely this is a field of coöperation which must appeal to the imagination and spirit of every progressive industry.

[18] Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922.

CHAPTER IV

THE DISSEMINATION OF BASIC BUSINESS FACTS

THE trade association is to-day the greatest single private agency engaged in gathering and broad-casting facts as they affect industry. An investigation by the Federal Trade Commission shows 474 associations, or more than thirty per cent of the associations reporting to the Commission to be compiling and distributing trade statistics.[1] Individual efforts to secure comprehensive facts as to total production of an industry, total sales, and price trends as shown by the consummated sales of many sellers are futile. Only the largest companies can maintain the special statistical department and wide-spread organizations which give them a reasonably accurate gauge on market conditions. The great majority of concerns are compelled to do business without reliable information of this kind. Only organized effort, either by associations or by the government, can secure accurate, comprehensive information from the original sources upon which a business man may safely rely.

Every business man rightly wants to know the basic, economic conditions in his industry, which should determine his present policy and inevitably must affect his future business. While the powerful political influence of agricultural interests has resulted in the creation of government agencies for the publication of trade data as it affects the farmer, there has been an almost complete lack of accurate, comprehensive statistics in all our industries until the past few years. The war stimulated the efforts made by our trade associations to collect and distribute the facts. Recurrent periods of overproduction and underproduction, with their resulting violent fluctuations in price, spotty markets, speculation and other injuries to industry and to the public are, to a considerable extent, due to the blind conditions under which business men have been compelled to

[1] Letter, P. J. Yoder, Secretary, Federal Trade Commission, Jan. 23, 1922.

work in the absence of some agency to inform them as to the facts. The law does not deprive business men of the right to secure the fullest possible data from every source. The law demands only that supply and demand shall not be subject to any artificial restrictions or control. Some of the most serious indictments of the competitive system spring from the fact that buyer and seller have been working in utter ignorance of the true conditions of supply and demand. A knowledge by all business men of the facts relating to their industry works for the maintenance and strengthening of the competitive system in industry. There has been a great need for years for fact-gathering agencies, which could compile four groups of business facts. First, there ought to be published periodically, if it is possible to secure reliable data, figures showing the productive capacity of each industry. Second, there should be a constant compilation of facts, showing current conditions of supply and demand. Third, there should be a means provided for the interchange of facts, regarding prices, costs, wages, waste, inventories and so on. Fourth, the facts with reference to the basic factors affecting the trend of the American industry generally will be of value. Substituting facts for rumors, misrepresentations and even fraud, should stabilize and strengthen business. It will create a sound economic foundation for the free, unrestricted operation of the law of supply and demand which the laws of the land endeavor to secure.

Value of Facts on Productive Capacity.—An accurate and widespread knowledge as to the productive capacity in each industry is desirable from every standpoint. It would tend to prevent excess overproduction and the investment of capital in industries, in which the supply has already outrun demand.[2] Few groups of business men will invest their money in new plants if the facts clearly show the physical capacity of the industry is already much greater than the demand. Thus, not only will the industry be protected from the evils of overproduction, with its great economic loss and tendency toward monopoly, but the investing public will also have reliable facts, which will

[2] Will H. Parry, Commissioner, Federal Trade Commission, *Proceedings*, First Annual Meeting, Southern Pine Association, p. 127.

tend to prevent it from diverting capital into non-productive fields. Banks would likewise have facts on which to decide upon limits of credit; and both risk and interest rates could in consequence be reduced.

Value of Facts on Supply and Demand.—Economists have long recognized that continuous information as to the conditions of supply and demand is necessary to the orderly conduct of trade and the protection of the interests of the public. More than a decade ago Jevons, in his Theory of Political Economy stated this fact in these words:—

> "It is of the very essence of trade to have wide and constant information. A market then, is theoretically perfect only when all traders have perfect knowledge of the conditions of supply and demand, . . .
>
> "So essential is a knowledge of the real state of supply and demand to the smooth procedure of trade and the real good of the community, that I conceive it would be quite legitimate to compel the publication of any requisite statistics. Secrecy can only conduce to the profit of speculators who gain from great fluctuations of prices." Pp. 87-88.

Because of the lack of governmental assistance, or the inability themselves to coöperate in securing the facts, business men of most industries have been compelled to grope, by means of their own organizations, special investigators, trade journals, and other limited agencies, amidst a maze of inaccurate and sometimes fraudulent information, in an effort to secure an approximate knowledge of the conditions of supply and demand. In seasonal industries, where the raw material must be purchased and the commodity sold in a limited period, misrepresentation of the facts is particularly rife.[3] The small business man has been especially handicapped because his facilities for securing information are very limited.[4] He does not have a sales force scattered throughout the country making daily reports nor can he afford to maintain a statistical organization to gather facts

[3] A. G. Kahn, Interstate Cottonseed Crushers' Assn., Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, p. 39.

[4] Testimony William O. Goodrich, President, William O. Goodrich Co., Transcript, *United States vs American Linseed Oil Co. et al.*, p. 295.

from every available source. There is no conceivable reason why every business man in the country is not entitled to know the facts of his industry. In the absence of governmental action, there is no reason why an association should not gather such statistics so long as the facts are not misused to restrict competition. A number of associations are endeavoring to place the industries that they represent on a sound economic basis, by gathering and distributing information showing current production, stocks on hand, current shipments, current orders and unfilled orders.[5] These facts when secured from a considerable portion of the concerns in the industry, give a fairly accurate picture of current conditions of supply and demand upon which each member may base his own individual business policy. Data of this character is invaluable.

It enables the business man to make an exact comparison of his business with general conditions in the industry.[6] If the total production of his industry is increasing while his production is standing still, he has notice of the necessity for drastic action, or the condition of his unshipped order file as contrasted with the general condition in the industry, may afford a reliable warning.[7] If on the other hand, the total production of the in-

[5] Among the associations which gather statistics of this character are —The Southern Pine Assn., Container Club, Prepared Roofing Assn., United States Sugar Mfrs'. Assn., National Assn. of Finishers of Cotton Fabrics, Associated Batting Mfrs., West Coast Lumbermen's Assn., Western Pine Mfrs.' Assn., California Pine Mfrs.' Assn., California Redwood Assn., North Carolina Pine Assn., Northern Hemlock & Hardwood Mfrs.' Assn., National Lumber Mfrs.' Assn., National Paint Oil & Varnish Mfrs.' Assn., Shellac Importers' Assn., National Implement Mfrs.' Assn., Tanners' Council, Knit Goods Mfrs.' of America, Newsprint Mfrs.' Assn.

For an interesting article dealing with the organization and methods of associations exchanging such information, and also prices, see "Open Price Associations," by H. R. Tosdal, *American Economic Review*, June, 1917, p. 331.

[6] Tipper: "The New Business," p. 162; E. J. Cornish, Chairman Statistical Committee, National Paint Oil & Varnish Assn., Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, pp. 21-23; F. L. Lamson, Treasurer, Norwalk Tire & Rubber Co., *New York Evening Post*, Oct. 22, 1921.

[7] A. C. Brown, Secretary, National Alliance Case Goods Mfrs., Annual Meeting, 1918, p. 7.

dustry is falling off, because of irresistible economic conditions, he may properly be more conservative in his price policy. In such a situation he is protected also against his own salesmen, who in reporting their inability to get the business are confident competitors are getting it at lower prices.[8] Figures showing a general decline in production in an industry might warn a manufacturer against undue expansion of his plant capacity, even though his volume of sales was increasing.[9] A business man might easily believe that he was falling behind his competitors, when possession of the facts would show his relative position was even better. A manufacturer selling without knowledge of the facts, will sometimes find himself receiving a heavy volume of orders, which will indicate he is strengthening his position in the industry, when as a matter of fact he is only the victim of a wave of speculative buying in no way representing consumers' demand. At the end of a few months, the trade is overbought, demand has vanished, cancellations pour in and the manufacturer is caught with a heavy inventory of finished goods on hand, resulting from his misjudgment of the facts. As a result he is forced to curtail his production and reduce his force, with a resulting loss of efficiency and positive harm to labor. Had he possessed information as to the situation faced by his competitors, he would have instantly recognized the demand as abnormal and speculative, and could have planned his business policy accordingly.[10] A heavy predominance of small orders gives warning of a possible oversupply and a tendency of the trade to buy closely. Complete data on current orders for the entire industry enables a manufacturer to check with his old orders and thus accurately measure the

[8] Harry J. Thayer, Treasurer, Tanners' Council, *Oil Paint & Drug Reporter*, Dec. 9, 1918, p. 13; Testimony, William O. Goodrich, President, William O. Goodrich Co.; Transcript, *United States vs American Linseed Oil Co. et al.*, p. 294; Testimony Federick K. Quine, Sales Manager, American Linseed Oil Co., *ibid.*, p. 423; Frederick A. Kessinger, *Proceedings*, American Envelope Mfrs'. Assn., 1917, p. 46.

[9] "The Open Price Plan," Roy A. Cheney, Secretary, Knit Goods Mfrs. of America, *Textile World*, May 7, 1921, p. 81.

[10] Frederick A. Kessinger, *Proceedings*, American Envelope Mfrs'. Assn., 1917, p. 50.

results of advertising or other sales efforts which he may deem making.[11]

If data showing the supply and demand in various regions is compiled, it instantly reveals the regions in which there is a surplus or shortage, thereby almost automatically directing the supply to the points of most active demand.[12] This natural adjustment stabilizes the general market and tends to prevent the assessment of unduly high prices in local markets. In a similar way data on the production and available supply of the different grades and varieties of a commodity, enables the manufacturers to shift their products from the grades in which there is evidence of an oversupply to those on which the demand is more active.[13] Thus equalization or stabilization of conditions is maintained through the increased liquidity of the supply, which prevents runaway markets on some grades and extremely low prices on others. A comparison of population, wealth and consumption per capita shown by reports of members may also reveal to the association membership potential markets where there are great possibilities for enlarging the sales of the members.[14] The possession of facts places the seller in a position where he can deal more intelligently with the distributor or buyer, who, by reason of his expert knowledge of market conditions, may otherwise have a great advantage in trade.[15]

Finally, the compilation of production figures enables an industry to gauge its progress as contrasted with competitive industries. Some industries have been practically standing still while their competitors have greatly enlarged their volume of sales. The butter industry, for example, has for some years

[11] Oliver Wroughton, *Proceedings*, American Envelope Mfrs'. Assn., 1917, p. 81.

[12] Charles S. Keith, President, Southern Pine Assn., *Fourth Annual Proceedings*, 1918, p. 10; P. A. Wheeler, U. S. Bureau of Markets, *Proceedings*, American Seed Trade Assn., 1917, p. 62; Year Book, U. S. Department of Agriculture, 1920, p. 129.

[13] Testimony D. F. Dutweber, Transcript, *American Column & Lumber Co. vs United States*, vol. 3, pp. 1563, 1568.

[14] Curtis: "Scientific Research for the Linen Trade," Wm. Strain & Sons, Ltd.

[15] Testimony, N. H. Nigh, Transcript, *American Column & Lumber Co. et al. vs United States*, vol. 3, pp. 1670, 1671.

made little progress, while the sale of butter substitutes has tremendously increased. As industries compile such facts they will be warned of such conditions and constructive efforts by the leaders to correct the situation will be greatly strengthened. Because of the interdependence of many industries, a comparison of conditions in other industries may also often be of great value.[16]

With reasonably complete data on existing supply as shown by production, stocks, and current shipments and prevailing demand, as shown by current and unfilled orders, every manufacturer and seller is in a position to make an intelligent determination as to what his price and as to what his production will be. There will always be great variation both in price and relative production, for men will always react differently to the same facts. Variation in costs of production, differences in individual conclusions as to cause and effect, peculiarity of circumstances surrounding the individual organization and many other shifting factors will produce varying results. Potential competition, the natural tendency of men to increase their production as prices assure a reasonable profit, and all the forces of competition are given free play. But these forces operate on a basis of facts, rather than on ignorance, suspicion and fraud.

Value of Facts on Operation and Management.—A third group of business statistics, which are of value for competitive purposes, are figures on material and labor costs, machine performance, labor performance, wages, inventories and the like.[17] There are few concerns which do not have a weakness in some department. The publication of detailed cost figures reveals to the individual business man where he is being outdistanced by his competitors. Data on machine and labor performance advises him whether he is getting average results and may reveal

[16] William Butterfield, National Implement Mfrs'. Assn., Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, p. 24; Ernest DuBrul, National Machine Tool Builders' Assn., *ibid.*, p. 33.

[17] Among associations exchanging data of this character are the Southern Pine Assn., Container Club, Associated Contractors of America and the Silk Association of America.

heavy losses, through inefficient labor or equipment. Data on raw materials in stock, not only measures the probable size of the remaining demand, but also gives him a safe guide for his own inventory policy. The constant publication of data, showing comparative utilization of materials so as to emphasize the degree of waste in an industry ought to have a tendency toward its partial elimination.[18] There could easily be built up in the course of years a clearing-house for the ideas of the entire membership of the association. In an industry where the members are competing with one or two centralized concerns, such an interchange of facts and methods can be of inestimable value.[19] The real purpose of such statistics, should be to enable the individual concern to increase its efficiency. As the inefficient manufacturers improve their conditions there will be a leveling of material and labor markets as well as a stabilization of price. But stabilization which naturally results from the individual efforts of business men to approach the highest degree of efficiency can scarcely be condemned.

Value of Facts Showing General Trend of Business.—The fourth variety of facts which an association may gather and compile for the benefit of its membership, are those fundamental facts which affect, and to a degree may be used as a basis for forecasting the trend of business in general. The interdependence of industries and the importance of certain factors in indicating the trend of financial, industrial and commercial conditions, is receiving wider recognition. Various private services have grown up to supply such facts, which are becoming popular among business men. Some associations are gathering this type of data and correlating it with the particular facts of their industry. What factors may be safely used in forecasting trends is still in process of determination. Data of such a character requires expert analysis and organization or it may be highly misleading. It should not be attempted, therefore, without the assistance of an expert statistician. The lumber manu-

[18] CURTIS: "Scientific Research for the Linen Trade," Wm. Strain & Sons, Ltd.

[19] An organization of this type is the Biscuit and Cracker Mfrs'. Assn.

facturers are publishing monthly tables and graphs, showing the following: (1) time money rates, (2) call money rates, (3) industrial dividend payments, (4) bank clearings, (5) price of industrial stock, (6) prices of railroad stock, (7) number of shares traded in New York Stock Exchange, (8) bank clearings, (9) business failures, (10) unfilled steel tonnage of the U. S. Steel Corporation, (11) imports of merchandise, (12) exports of merchandise, (13) new corporations, (14) lumber shipments, (15) lumber orders, (16) Bradstreet's commodities index, (17) pig iron production, (18) bituminous coal production, (19) crude steel production, (20) lumber production and (21) building construction in twenty cities.[20] The Department of Commerce is publishing each month a wealth of statistical data of this character, secured from government agencies, trade associations, and trade journals.[21]

Benefits to Public.—The benefits to the public from a complete publicity of trade data, though generally ignored, are very substantial. In the first place, possession of such facts increases the sales ability of the small manufacturer. He cannot so easily be victimized by buyers or speculators. The large manufacturer, with his offices scattered throughout the country is able to keep in close contact with market conditions. The small manufacturer often not even possessing a sales organization is greatly handicapped in making sales to distributors, whose greatest asset is their keen knowledge of market conditions everywhere.[22] Where there is a speculative group in the industry, the small manufacturer, acting in ignorance of the facts, may suffer without any corresponding benefit accruing to the

[20] Graphic Summary of Business Statistics, National Association of Lumber Mfrs.; for a discussion of the importance of various factors as indicative of business trends, see COPELAND, "Business Statistics," Harvard University Press; pamphlet, "The Business Cycle," *New York Evening Post*, 1921.

[21] See Survey of Current Business, U. S. Department of Commerce.

[22] Testimony, J. W. Bailey, Transcript, *American Column & Lumber Co. et al. vs United States*, vol. 3, p. 1640; Testimony, F. R. Babcock, *ibid.*, pp. 1544, 1563; Testimony, William O. Goodrich, President, William O. Goodrich Co., Transcript, *United States vs American Linseed Oil Co. et al.*, p. 294.

public. Exact knowledge, on the other hand, increases his efficiency in trade and tends to assure his maintenance as a source of supply to the general public. Secondly, the gradual building up of a mass of trade data in every industry, will develop a vast fund of accurate, vital, trade information of the utmost importance to industry and government.[23] Facts will be available on which business studies can be made of the causes and effects of depressions and other great fundamental trends in industry. Great benefits would flow to industry and to the public, if such a study could develop facts, which would enable even the partial elimination of the great economic waste and destruction of capital, which often results from the present organization of industry. Facts could be made the basis of federal regulations, rather than prejudice and misconceptions, which is sometimes now the case.[24] Third, the existence of such statistics is invaluable to the government and to the industry in time of war. War with its overwhelming demand for materials, its priorities, its commandeering of plants and supplies, its food regulations, and what not, makes the creation of an accurate fund of industrial information very much in the public interest. The world war emphasized the great need and found both the government and many industries seriously embarrassed, by a total lack of elementary facts regarding production and uses. Knowledge of the productive capacity of an industry, the production on hand, the available supply of important war material may all be of the utmost importance in the development of an emergency war program. The need of such information was impressed upon governmental officials during the war, and has been publicly recognized by them.[25]

Finally, publicity of the conditions of supply and demand

[23] Herbert Hoover, Secretary of Commerce, Official Summary; Proceedings of Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, p. 13.

[24] E. J. Cornish, Chairman, Statistical Committee, National Paint Oil & Varnish Assn., Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, p. 20.

[25] Lessons of War Cost Finding: William B. Colver, Chairman, Federal Trade Commission, *Annals of the American Academy*, vol. 82, March, 1919, p. 300.

stabilizes industry and tends to prevent violent price fluctuations, with their resulting public injuries.[26] As already discussed, publicity as to the facts of supply and demand tends to equalize values and to level prices in all markets, by revealing the points of surplus and shortage. Thus excessive prices in panic markets and ruinously low prices in flooded markets are in a measure avoided. In much the same way, there is a marked tendency to keep the varieties of a product on a fair basis of competitive value, for facts showing a shortage or approaching shortage on one grade will cause the manufacturers, knowing this condition, to divert production to the grade in greater demand, while an obvious oversupply of another grade will cause manufacturers to lessen their production of such an item. Thus there is a natural tendency, through the normal operation of the law of supply and demand, functioning under a system where all the facts are available to buyer and seller, for excessive prices on certain grades to be leveled, so that the entire line is equalized. Again, an exact knowledge of the facts by buyers and sellers, tends on the one hand to prevent sales at excessive prices and on the other to make it more difficult, through fraud or misrepresentation of facts, to buy at unduly low prices. Opportunity for one manufacturer to compare his ability in production and in selling with that of other competitors is afforded, thus enabling him to improve his own methods where they are defective. It should be frankly admitted, therefore, that one of the main purposes and benefits flowing from a complete publicity of trade data, is its tendency to stabilize prices. In the absence of artificial factors, such as, agreements to fix prices or curtail production, this stabilization springs from the unhampered play of competition between many sellers and buyers, each of whom in-

[26] Annual Report, Henry H. Rolapp, President, U. S. Sugar Mfrs'. Assn., March 28, 1918: Interview, Henry R. Seager, Columbia University, *New York Evening Post*, March 21, 1922; Address, President McElwain, Fifteenth Annual Convention, National Assn. of Boot & Shoe Mfrs., p. 101; Testimony, George E. Martin, Vice-president, Sherwin-Williams Company, Transcript, *United States vs American Linseed Oil Co. et al.*, p. 347; see also "Waste in Industry," Report of Federated American Engineering Societies, 1921, p. 30.

dividually shapes his own business policy on facts, rather than on ignorance.

Surely a stabilization of price which is the natural result of an increased liquidity of the supply and its more sensitive reaction to demand, and which tends to place all buyers on a more nearly equal footing is not against the public interest. Surely a leveling of price between grades or varieties, resulting solely from the reaction of individual intelligence to known facts and tending to maintain fair comparative values to every one, is not detrimental to the public. Surely a leveling of price which naturally results from the partial elimination of fraud, deception and ignorance by the seller or buyer in trade does not harm the public. Surely a tendency toward less variation in price, which is the result of increased efficiency reducing the costs of producers, is not to be condemned. As a matter of fact, the violent fluctuations in price characteristic of many of our industries are very much against the interests of the public. The public probably pays more in dollars and cents per unit of goods under such conditions. The risks of a fluctuating market compel sellers to take a larger maximum of profit regularly, in order to protect themselves.[27] Our system of distribution involves several handlings of the goods before they reach the consumer. When manufacturers' prices advance strongly, it is but human nature for the wholesaler, retailer and other factors in the industry to quickly mark up their goods. When prices decline, it is likewise human nature not to want to take a loss and any fall in the price the consumer pays is therefore retarded. The result is that the consumer quickly feels the advances, but gets only a portion of the decline. In rapidly fluctuating markets, upturns in price which are generally almost immediately reflected, check the decline in distributors' prices before they reach bottom with the result that the public often does not get the full benefit of the lower price offered by the manufacturer. Widely fluctuating prices, moreover, invite speculation and the entry of speculators not needed in the economic structure of the industry, with a resulting natural ten-

[27] Testimony, Louis M. Leffingwell, President, Northern Linseed Oil Co.; Transcript, *United States vs American Linseed Oil Co. et al.*, p. 415.

dency toward increased cost to the community.[28] Speculative buying disrupts the normal conditions of an industry. In the absence of accurate trade data, speculative buying often produces temporary overproduction which in turn compels subsequent shutdowns, increased overhead expense, unemployment of labor and other well recognized evils. With accurate knowledge, manufacturers ought at least to be able to curb harmful speculation to a considerable extent. Stabilization of prices, when it results from the cumulative effects of the individual business policies of many competitors, as distinguished from agreements, express or implied, restricting production or price, is a great public benefit, assuring to the public a lower and non-discriminatory average price and to the industry steadier production and greater freedom from speculation. Always in reserve as an additional safeguard against the imposition of unreasonable prices, are the forces of potential competition, the competition of industries producing substitutes and, in the absence of tariff restrictions, the force of foreign competition.

Methods of Compilation.—An association contemplating the compilation of statistics of this character may use any one of three methods. First, the data may be gathered, compiled and circulated through the office of the secretary of the association. This is the most common method. Second, some person or organization entirely independent of the association may be employed. Some associations employ an accountant to conduct the work, in order to assure to their members privacy of individual returns and accurate compilations.[29] Other associations employ an attorney to conduct the work, in order to avoid the possibility of violation of law.[30] Other associations employ regular commercial agencies, which have been organized to handle such work.[31] Third, a number of associations have se-

[28] See address Herbert Hoover, U. S. Secretary of Commerce, Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922.

[29] For example, this is the method followed by Pressed Metal Assn.; see "Open Price Association," H. R. Tosdal, *American Economic Review*, June, 1917, p. 341.

[30] This is the method employed by the Pyroxylin Plasters Mfrs'. Assn.

[31] This is the method followed by the Associated Metal Lath Mfrs. and the Linseed Oil Council.

cured the coöperation of the government in the collection and dissemination of trade data of this character. The Department of Agriculture has for years published current statistics of farm products and products manufactured from farm products.[32] The value of its crop estimates has of course been long known, the compilation and publication of which have been surrounded with the greatest secrecy, in order to prevent advance information being secured. The Department has developed this phase of its work to a far greater extent than is generally known. The Bureau of Markets has a large number of branch offices in all of the largest market centers. It maintains over four thousand miles of leased telegraph wires to furnish the freshest possible information. The radio is now also being employed. Market experts are kept in constant touch with market conditions and over 15,000 individual voluntary reporters render regular reports to the bureau on the marketing of farm products. This department aims to place daily national market information in the hands of all producers through the use of the wireless. It is getting out weekly and special reports, not only on farm products, but also on articles manufactured from them. Facts as to receipts, stocks, prices, and strength of the various markets of butter, cheese, powdered milk, condensed milk and so on are published.[33] This department has in fact developed a great national system of fact collection and distribution, for the benefit of producers and distributors of farm products, and manufacturers of products, produced largely from these materials. The farmers of the country are now demanding a further enlargement of this service. If their recommendations are followed, a service incomparably more comprehensive than that developed by any trade association will be carried on by the department.[34] The Federal Trade Commission also, several years ago, began the compilation of data designed to assemble current prices, costs and production figures, in the great basic in-

[32] Year Book: U. S. Department of Agriculture, p. 127 ff.

[33] See "Weather Crops and Markets," published weekly; "Powdered Milk Market Report," published monthly; "Weekly Cheese Market Report," all published by the Bureau of Markets, Department of Agriculture.

[34] See *Final Report* of Committee on Crops and Market Statistics, to the National Agricultural Conference, Jan. 26, 1922.

dustries of the country. The Commission, however, utilized its powers to compel the production of such information and the opposition of several concerns in the steel and coal industries, has resulted in the work being temporarily discontinued, pending a final decision by the courts as to the power of the commission. For several years, monthly summaries on production, stocks, shipments, cost of production, and similar data, have been compiled by the commission for the manufacturers of wood pulp and other kind of pulp used in newspaper making.[35]

Secretary Hoover of the United States Department of Commerce is now developing a great organization for coöperation with all American industries in the dissemination of business facts. This department, by reason of the census machinery possessed by it, is in a position to build up a very effective organization for the quick dissemination of such facts while they retain their practical business value. Over thirty national trade associations are now furnishing data to the department which is published monthly.[36] With the coöperation of the business community, this department can rapidly develop into a great agency for the compilation and broadcasting of all those facts which have a direct interest to business men. While the expense of compilation would make such work by the department almost prohibitive, the many trade associations of the country, by lending their organizations for the collection of information, can utilize this department for its widespread distribution. In view of the possible danger of misrepresentation of facts by associations when such facts are given general publicity, as indicated by the various proceedings against exchanges for "wash sales," fictitious sales, and the like, the government should protect the public by proper requirements assuring the accuracy of the data it publishes.

Legality.—The Attorney General of the United States, in a recent opinion to the Secretary of Commerce, held that the compilation of production, distribution and price statistics is not

[35] See "Statistical Summary" of the Paper Industry, for August, 1921; and "Wood Pulp Review" for July, 1921, issued by the Federal Trade Commission.

[36] See "Survey of Current Business," April, 1922, p. 44, U. S. Department of Commerce.

illegal, provided always that whatever is done is not used as a scheme or device to curtail production or enhance prices, and does not have the effect of suppressing competition.[37] A lower Federal court, in the strongest language, has sustained the propriety of the dissemination by an association of facts of this character, including price statistics, in the absence of any proof of express or tacit understandings to regulate price or production.[38] This court called the bureau disseminating these facts "a bureau of intelligence and one which makes for real rather than artificial competition in trade."[39] The fact that the exchange of such information stabilized the market, and to a certain extent tended toward less deviation in price, in the absence of any agreement, was held not to be in violation of the law.

But where there is any effort to utilize the machinery adopted for such an interchange of facts, as part of a scheme to restrict production or fix prices, even in a tacit or implied way, the almost certain result is a violation of the law. In the recent decision of the United States Supreme Court involving the open price plan of the American Hardwood Manufacturers' Association, the court was unsparing in its condemnation of the plan, which involved, not only the mere interchange of information, but also frequent meetings, the withholding of such information from buyers, the analysis of such facts by an expert and the publication of letters and bulletins, urging increases in price and restriction in production, all of which resulted in a curtailment in production and contributed to an extraordinary increase in price.[40] There was in this case, not the mere exchange of facts for common information, but meetings, recommendations, reports of the membership as to future markets, and other facts which created implied understandings to restrain trade, which of course made the entire plan unlawful. The court itself was careful to point out this distinction.

There would appear to be no sound basis in law for holding

[37] See Appendix J.

[38] *United States vs American Linseed Oil Co. et al.*, 275 Fed. 939 (1921).

[39] *Ibid.*, 946.

[40] *American Column & Lumber Co. et al. vs United States*, 14 Sup. Ct. Rep. 114 (1921).

that the mere exchange of information, without any further co-operative action is unlawful. Any association, however, planning to compile, distribute and broadcast the business facts of the industries secured from different members, in order to avoid any possibility of violation of law, should be exceedingly careful that this plan complies with the following requirements: First, *only* the naked facts should be circulated, without any recommendation of any officials of the association. As soon as any recommendations are made, the almost inevitable tendency is for a situation to arise where the members, or a considerable portion of them, cease to make their own individual judgment on the facts, but simply follow the recommendations made and an implied understanding in violation of the law arises.

Second, there should be no publication of prices.[41] While it is extremely doubtful that the mere circulation of prices on sales consummated is unlawful, yet the opposition of the government to the circulation of price information establishes a risk of public prosecution, which no association earnestly striving to comply with the law can afford to take.[42] It is almost certain that the publication of high, low and average prices, on sales consummated by members of an association, will not be held to be unlawful. On the other hand, the publication of the individual prices identifying the members making them, not only creates an opportunity for the exercising of social pressure on the price-cutter, but also furnishes the basis on which a "follow the leader" plan can easily be made very effective. In a similar way it is unwise to publish individual figures of production. Accurate data on the total production of his industry, and the total demand is of aid to the manufacturer in determining his own business policy. The publication of individual

[41] An investigation by the Federal Trade Commission, discloses 150 associations distributing price information: Letter, J. P. Yoder, Secretary, Jan. 23, 1922.

[42] Most of the Government Departments which have given study to this question seem opposed to the so-called open price association, *i.e.*, those exchanging prices, as not in the public interest. Letter, Federal Trade Commission to the President of the United States, April 18, 1921; Statement, Herbert Hoover, Secretary of Commerce, Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, p. 3.

facts of production in an industry where there are several very large concerns may tend to cause the members of an association to follow the policy of some one of the larger concerns in whose judgment they have confidence with the result that a general policy of restriction of production could easily become effective in the industry.

Third, the data circulated should be accurate. The reporting of sales which were not bona fide, or the elimination of any data, such as very low prices made by some member, or the suppression of some facts on production designed to mislead the membership as to price or production conditions, so as either to bring about a possible enhancement of prices or curtailment of production or to deceive buyers who secure such information would be unlawful. The government has in the past brought several proceedings against organizations which have reported fictitious or "washed sales" or pretended purchases for the purposes of deception and restraint of competition.[43]

Fourth, there should be no meetings for the consideration of the facts gathered. The practice of holding frequent meetings for the consideration of such data, not only affords an opportunity for putting pressure on members who cut prices or enlarge their production, but also inevitably tends, through discussion of conditions and trends to tacit agreements to restrict production or fix prices. Under no conditions should meetings be held for the analysis and discussion of such facts unless an attorney who is not afraid to lose his retainer is present to control rigorously the limits of the discussion.

Finally, there should be a simultaneous publication of the data to the members and all other parties interested. This requirement of complete publicity has been stressed by government officials.[44] The Supreme Court in the Hardwood Case gave considerable emphasis to the fact that the statistics of the

[43] Decree, *United States vs Chicago Butter & Egg Board*, Decrees & Judgments in Federal Anti-Trust Cases, p. 261; Consent decree, *United States vs Elgin Board of Trade, ibid.*, p. 402.

[44] Address, Herbert Hoover, U. S. Secretary of Commerce, Official Summary, Conference of Trade Assn. Representatives, Washington, D. C., April 12, 1922, p. 14; Letter of Federal Trade Commission to the President of the United States, April 18, 1921, p. 3.

hardwood association were not distributed to the public. The publication of such data, while it may take away from the members of the association some advantages in trading, does not deprive the membership of the basic, economic benefits which flow from the limitation of speculation, the increased liquidity of supply, the freedom from misrepresentation and the comprehensive knowledge of the facts, which the publication of such statistics procures.

There can be little doubt that the compilation and broadcasting of the basic facts of an industry is one of the greatest of trade association activities. Misused it is vicious. And any association attempting to misuse such facts must expect ultimately to pay the penalty. But when used properly, the compilation and current publication of the basic facts of an industry, either by the government or by an association, is of real value in the maintenance and efficient operation of our competitive system.

CHAPTER V

THE STUDY OF COST AND ACCOUNTING METHODS

THE Federal Trade Commission, by its educational campaign several years ago urging the importance of an accurate knowledge of costs in our various industries, greatly stimulated the interest of business men and trade associations in this subject.[1] Many trade associations have developed uniform cost accounting systems within the past few years.[2] The Chamber of Commerce of the United States with its program for the more widespread use of cost systems has added great impetus to the move-

[1] The Commission has issued the following pamphlets of cost accounting which have had a very large circulation: "Fundamentals of a Cost System for Manufacturers," July 1, 1916; "A System of Accounts for Retail Merchants," July 15, 1916. See also numerous addresses of E. N. Hurley while Chairman of the Commission.

[2] The following associations are a few of the associations which have adopted or are planning the adoption of cost accounting systems of some sort: American Warehousemen's Assn., National Assn. of Retail Clothiers, Portland Cement Assn., National Coal Assn., National Implement & Vehicle Assn., Associated Cooperage Industries of America, Flavoring Extract Mfrs'. Assn. of U. S., National Pipe & Supplies Assn., West Coast Lumbermen's Assn., Southern Pine Assn., Refractories Accountants' Institute, National Coffee Roasters' Assn., U. S. Potters' Assn., United Typothetæ of America, Laundry-owners' National Assn., American Photo-Engravers' Assn., National Wholesale Grocers' Assn., National Assn. of Ice Cream Mfrs., National Wholesale Druggists' Assn., National Warm Air Heating & Ventilating Assn., National Retail Jewelers' Assn., Cost Assn. of the Paper Industry, Paint Mfrs'. Assn. of the United States, Baggage Mfrs'. Assn., American Face Brick Assn., Associated General Contractors of America, Asphalt Assn., Steel Barrel Mfrs.' Assn., Interstate Cotton Seed Crushers' Assn., National Assn. of Finishers of Cotton Fabrics, Associated Mfrs. of Electrical Supplies, Electrical Mfrs'. Council, National Assn. of Farm Equipment Mfrs., American Foundrymen's Assn., Central Bureau of Dining Table Mfrs., National Alliance of Case Goods Assn., National Assn. of Steel Furniture Mfrs., National Assn. of Upholstered Furniture Mfrs., Associated Wooden Ware Mfrs., Webbing Mfrs. Exchange, American Bakers' Assn., International Stamp Mfrs'. Assn., Plywood Mfrs'.

ment.[3] Few forms of associated activities produce more far-reaching results in establishing healthful conditions of efficient production and distribution than the education of the several branches of an industry in accurate methods of accounting and cost finding. But there are few activities in which it is more difficult to draw the line between that which is lawful and that which is unlawful.

Benefits of Use of Cost Accounting Systems.—A general use of a uniform system of cost accounting not only benefits the individual members but also has a healthful reaction on the entire industry. It is this larger general benefit which makes this activity of special interest to trade organizations. To the individual, an accurate cost system is invaluable.

Sound Basis for Determination of Price.—In the first place it furnishes a sound definite basis on which to fix a selling price.[4] The investigations of the Federal Trade Commission in 1915 showed a large percentage of manufacturers had no cost systems whatever and based their selling price on guess work or on the rumored prices of their competitors.[5] In some industries involving many complicated operations, a correct ascertainment

Assn., Label Mfrs'. Assn., National Assn. of Ice Industries, National Assn. of Printing Ink Makers, Leather Belting Exchange, Sterling Silver Mfrs'. Assn., National Lime Assn., Railway Car Mfrs'. Assn., Western Pine Mfrs'. Assn., American Drop Forging Institute, National Assn. of Sheet and Tin Plate Mfrs., National Assn. of Brass Mfrs., Pressed Metal Assn., Folding Box Mfrs'. National Assn., Box Board Mfrs'. Assn., National Paper Box Mfrs'. Assn., Tubular Plumbing Goods & Tank Fittings Exchange, Assn. of Mfrs. of Chilled Car Wheels, and the National Canners' Assn.

[3] The Fabricated Production Department of the Chamber of Commerce of the United States has published various pamphlets and bulletins on cost accounting problems and has collected a number of cost systems of trade associations. It willingly gives the benefit of its experience and data to associations contemplating the installation of cost systems.

[4] "Importance of Cost Analysis and Its Relation to Price," *The Annalist*, Aug. 18, 1919, p. 200; "Uniform Plan of Cost Accounting Control," Cooley & Marvin Company, p. 4; "Fundamentals of a Cost System for Manufacturers," Federal Trade Commission, 1916, p. 30; "What a Cost System Should Do for You," Chamber of Commerce of the United States, 1920; Report of Committee on Production Costs, National Assn. of Cotton Mfrs., *Textile World*, April 30, 1921, p. 109.

[5] *Annual Report*, Federal Trade Commission, 1916, p. 15.

of cost is impracticable.[6] The steadily narrowing margin of profits in most of our industries, resulting from the development of volume production, makes guesswork in the fixing of the sales price hazardous if profits are to be maintained.[7] An error in fixing prices resulting in losses forces attempts to subsequently recoup such losses through unduly high prices. Greater instability of prices is often the result which could have been avoided through an accurate knowledge of cost.[8] By a careful analysis of the elements of cost, which a cost system provides, an accurate definite picture of the real cost of doing business is secured upon which a manufacturer can safely ground his price and production policy. He will be saved from the mistakes constantly being made of failing to allow properly for depreciation, obsolescence, depletion and other items which often result in an actual dissipation of capital assets when the seller imagines he is making a profit. He will have a means of accurately estimating and apportioning his overhead, his material and labor costs instead of merely making an arbitrary estimate. Personal supervision of all the details and processes entering into cost is an absolute impossibility in the large plant. An executive cannot hope to have any accurate knowledge of his costs unless they are carefully determined in a scientific way. Where the manufacturer has heretofore relied on an uncertain knowledge of conditions of supply and demand, and often on uncertain information as to the prices of his competitors, a cost system furnishes him additional certain definite data on which to base his own selling policy. If the business offered him is unprofitable, he can let the other fellow have it or if depressed conditions of demand compel prices below cost, he knows exactly the loss entailed in handling the order and can balance accurately such loss as against the indirect benefits in taking the order.

Locates and Eliminates Waste.—An accurate cost system pro-

6 "The Necessity of Proper Accounting Methods," L. F. Folsom, *Photo-Engravers' Bulletin*, July, 1918, p. 101.

7 "Fundamentals of a Cost System for Manufacturers," Federal Trade Commission, 1916, p. 6.

8 "Importance of Cost Analysis and Its Relation to Price," *The Annalist*, Aug. 18, 1919, p. 200.

motes efficiency by enabling a manufacturer to locate and eliminate wastes.[9] Such wastes take many forms. They may result from the use of obsolete machinery; they may be caused by inefficient labor;[10] they may result from wasteful use of material, petty thievery or what not.[11]

Aids in Improvement of Quality.—A cost system is often of aid in improving quality. Active coöperation between the cost

[9] "Fundamentals of a Cost System for Manufacturers," Federal Trade Commission, 1916, p. 30; *Photo-Engravers' Bulletin,* July, 1918, p. 13; "What a Cost System Should Do for You," Chamber of Commerce of the United States, p. 4.

[10] See "Securing Effective Work from Labor," Official Publications National Assn. of Cost Accountants, vol. 3, No. 5, Nov. 15, 1921. It is interesting also to note that the National Assn. of Manufacturing Photo-Engravers in order to secure the coöperation of the International Photo-Engravers' Union of North America in the installation and operation of their cost system were apparently compelled to enter into an agreement with the Union that such system should not be used "by any employer for the purpose of checking up or speeding up the workmen." See agreement, Oct. 1, 1913, in "Manual of Simple Cost System," International Assn. of Manufacturing Photo-Engravers, Nov., 1916, Edition, p. 19. As a result of a conference between the manufacturers' association and the union in June, 1916, it was agreed by the manufacturers that the cost system should be based upon a departmental plan, access to the records being given the officers of the union to prevent the use of the system for speeding up purposes. The annual convention of the union subsequently adopted a report opposing any system of cost finding "intended or which could be used for the purpose of speeding up our members and creating undue suspicion of unfair competition between them, or to prevent them in realizing an improved condition of work by a cunning and subtle use of individual time records." *Bulletin* of International Assn. of Manufacturing Photo-Engravers.

[11] The system installed by the laundry owners revealed large wastes in labor costs, fuel consumption, and excessive collection and delivery expense. In some cases these costs were double what they should have been. "Cost Accounting in the Laundry Industry," Official Publication, National Assn. of Cost Accountants, vol. 3, No. 3, Oct., 1921. In one paper mill the cost system immediately detected an increase in daily consumption of bleach powder which on investigation was found to be due to fictitious readings resulting from the use of a cracked hydrometer, a leak which if not caught could easily have cost the mill $2,000 per month. Address, "The Need of Close Contact between Cost and Technical Men," Fred C. Clark, Sixth Semi-annual Convention, Cost Assn. of Paper Industry, Oct. 6, 1921.

expert and the technical man in a close study to reduce costs and procure more economical operation often develops and improves new processes for making a better product.[12]

Aids in Stimulating Production.—A cost system explained by charts, totals and percentages picturing graphically the work of each individual and department can sometimes be of substantial help in stimulating production and securing the cooperation of the workers in the plant.[13]

Aids in Bettering Credit Standing.—The individual may often find a cost system which gives accurate information as to the condition of his business, of decided help in securing a better credit standing with his banker.[14]

Attracts Trade.—In industries involving job work, the knowledge that the seller fixes his sales price on the basis of actual cost plus a reasonable profit without discrimination between his customers, may be the means of attracting and holding customers. Some business men find a cost system pays for itself in this way alone. In cases of dispute the submission of the cost record to the customer will often convince him of the reasonableness of the price and result in the retention of his patronage.[15] One photo engraver found the policy of making

[12] "Need of Close Contact between Cost and Technical Men," Fred C. Clark, Sixth Semi-annual Convention, Cost Assn. of Paper Industry, Oct. 6, 1921.

[13] Address, "The Necessity of Coöperation between the Superintendent and the Cost Department," Ed. T. A. Coughlin, Superintendent, Coating Division, Monarch Paper Co., Sixth Semi-annual Convention of the Cost Assn. of the Paper Industry, Oct. 6, 1921. See also "Securing Effective Work from Labor," Official Publications, National Assn. of Cost Accountants, vol. 3, No. 5, Nov. 15, 1921; "Managerial Uses of Foundry Costs," *ibid.*, Dec., 1920, p. 12.

[14] "Fundamentals of a Cost System for Manufacturers," Federal Trade Commission, 1916, p. 3; "Report of Cost Research Committee," *Proceedings*, Eleventh Annual Meeting, National Wholesale Grocers' Assn., 1917, p. 160; Address, "The Necessity of Cost Finding," Oscar Kwiat, *Photo-Engravers' Bulletin*, July, 1918, p. 113; *Proceedings*, National Assn. of Ice Cream Manufacturers, 1920, p. 90; "Report of Committee on Production Costs," National Assn. of Cotton Manufacturers, *Textile World*, April 30, 1921, p. 109.

[15] Address, "The Necessity of Cost Finding," Oscar Kwiat, *Photo-Engravers' Bulletin*, July, 1918, p. 113.

prices to customers on a cost plus basis so attractive in securing volume orders that 75 per cent of his business which has greatly increased under this policy is now conducted on this basis.[16]

Aids in Making Tax Returns.—Accurate accounting is essential in making tax returns to the Federal government. The only way to make a safe tax return is to make an accurate return. Accurate returns cannot be made without an accurate accounting system.[17] A failure to include all elements of cost will result in the payment of taxes on imaginary profits when in fact such estimated profits may be in part an actual dissipation of assets.[18]

But so far as association participation in cost accounting work is concerned, to justify the expense of such work there must be some general benefits to the industry. There are benefits of a very substantial character.

Cost Comparisons Increase Efficiency.—The publication of cost data by an association making possible a comparison of costs will almost certainly result in increased efficiency of the industry. The Southern Pine Association, The American Wholesale Lumber Association, The National Wholesale Grocers' Association and many other organizations compile the cost figures furnished by their various members without of course revealing the names of the members. Each member is thereby enabled to compare each and every one of his costs with those of his competitors. Often startling variations are revealed.[19] Such data enables a member to force down items on which his costs are excessive at least to the average for the industry.[20]

[16] Address, "The Necessity of Proper Accounting Methods," Joseph Mack, *Photo-Engravers' Bulletin*, July, 1918, p. 97.

[17] Address, "The Necessity of Proper Accounting Methods," L. B. Folsom, *Photo-Engravers' Bulletin*, July, 1918, p. 101.

[18] Address, "The Necessity of Proper Accounting Methods," Joseph Mack, *Photo-Engravers' Bulletin*, July, 1918, p. 97.

[19] See "Report of Committee on Accounting and Statistics," Southern Pine Assn., *Fourth Annual Proceedings*, 1918, p. 147; Address, Melvin T. Copeland, Director Bureau of Business Research, Harvard University, Eleventh Annual Meeting National Wholesale Grocers' Assn., 1917, p. 85.

[20] "Report of Committee on Production Costs," National Assn. of Cotton Mfrs., *Textile World*, April 30, 1921, p. 109.

The general tendency of such comparisons ought certainly to be to increase the efficiency of the individual members.

Cost Data of Value in Relations with Government.—Again a uniform system of accounting may be of value to the industry in its relations with the government. The administration of excess profits and income taxes involves many accounting questions such as depreciation and depletion, the fixing of inventory values and so on. In fixing rates of depreciation, for example, the Internal Revenue Bureau is often entirely without accurate information and arbitrary action unfairly burdening the industry may result. An impartial, accurate study of such a question may return to the industry value far in excess of expenses for such work. The idea of such a study has been approved in principle by the Bureau.[21] The price fixing powers granted our government by war legislation emphasized the lack of and need for accurate costs in many industries. Some industries suffered from the prices fixed on estimates which were intended to be liberal. Other industries able to offer convincing proof as to their costs of production conducted their business without injury. The Southern Pine Association, for example, at the outbreak of the war was able to present detailed cost figures for the industry over a period of years with the result that the industry secured an advance of $1.50 per M over the tentative figure fixed by the War Industries Board on yellow pine lumber. This advance of course totaled a very large sum on the sales of the members during the period this price was in effect.[22] The experience of the past war may be repeated at any time. Does not a reasonable degree of foresight demand that industries should be prepared for such emergencies? Moreover, the trend of legislation affecting industries dealing with our natural resources is unquestionably toward stricter supervision and even possible price regulation. The demand for such legislation, indeed for other forms of regulatory legislation, often arises because of the public feeling that prices are excessive. There is

[21] See letter, Assistant Commissioner C. P. Smith, Dec. 2, 1921, *Bull. 14*, Fabricated Production Department, Chamber of Commerce of the United States.

[22] "Report of Committee on Accounting and Statistics," *Fourth Annual Proceedings*, Southern Pine Assn., 1918, p. 143.

at the present time a growing determination on the part of the public and of the government to determine the relative responsibility of manufacturer, wholesaler, and retailer for inflated prices. An industry without comprehensive cost data is placing itself in a weak and defenseless position for the future. An industry with a well-organized cost system on the contrary is in a position to combat unfair legislation or investigation with convincing facts.

Stabilization of Prices.—Finally, a system of cost accounting generally used throughout the industry will beyond doubt tend to stabilize prices at a reasonable level. The laws of competition do not demand that men shall sell their products below cost. On the contrary, selling below cost for the purpose of destroying competitors is a competitive method which has been enjoined by action of the government.[23] As business men in our various industries learn to figure properly their cost there will be less selling below cost when market conditions do not compel it. But on the other hand a widespread comparison of costs will undoubtedly reveal waste and excessive expenses which if eliminated will reduce costs and tend to reduce prices to the public. The scaling up of prices by producers selling at prices below cost and the scaling down of the prices of high cost producers, if competition is in no way restricted, ought to establish a more stable and reasonable market price relieving manufacturers, distributors and consumers in some degree from the many ills of a fluctuating market.

Methods of Installation.—The scope of a cost system and the method of its development depends upon the finances of the association.

Cost Accounting Committees.—The work may be merely conducted by a cost accounting committee which will secure data by questionnaire or other means for comparative purposes on some elements of cost as to which the experience of the industry has found there is great room for improvement. This is a

[23] *United States vs Great Lakes Towing Co.*, Decrees and Judgments in Federal Anti-Trust Cases, p. 256; *United States vs American Thread Co., ibid.*, p. 455; *United States vs Corn Products Refining Co., ibid.*, p. 445; *United States vs Bouser & Co., ibid.*, p. 591; *United States vs National Cash Register Co., ibid.*, p. 317.

method employed by the National Wholesale Druggists' Association, The National Warm Air Heating & Ventilating Association, and a number of smaller associations.[24]

Coöperation with Educational Institutions.—A cost system may be evolved by representatives of the industry in coöperation with some university or college. The National Wholesale Grocers' Association, the American National Retail Jewelers' Association, and the National Shoe Retailers' Association, working with the Bureau of Business Research of Harvard University, have developed cost accounting systems for their members.[25] The University has made a careful study of comparative costs for the benefit of associations. An educational bureau is maintained by the wholesalers' association to aid individual members in installing the system and to issue bulletins and other data on various cost accounting problems for the benefit of the membership. The National Coffee Roasters' Association are engaged in similar work with the School of Business of Columbia University.[26]

Employment of Cost Accountants.—A third method is to employ some cost accountant of high standing to study the industry and to develop a system for general use in the industry. This is the method most commonly employed and the expense involved varies with the ambition of the particular association. Some associations such as the Southern Pine Association and the American Wholesale Lumber Association employ an accountant as a part of their organization whose duty it is to compile for comparative purposes the cost data secured. Such an accountant meeting with the bookkeepers or accountants of the various members can advise them as to the purpose and scope of the system and simplify the method of installation. The United Typothetæ of America which has a large membership and has organized a gigantic cost accounting campaign

[24] *Warm Air and Sheet Metal Journal,* July, 1918, p. 51; *Oil, Paint and Drug Reporter,* Oct. 4, 1921, p. 27.

[25] "Report of Cost Research and Statistical Committee," Eleventh Annual Meeting, National Wholesale Grocers' Assn., 1917, p. 160; "Uniform Accounting Systems Urged for Trade Associations," Melvin T. Copeland, *New York Evening Post,* March 28, 1922.

[26] *The Spice Mill,* Nov., 1921, p. 1213.

financed with the aid of some twenty-nine trade associations in industries closely related to printing, maintains an organization of accountants whose services are available to each member to aid in the installation of the system in his plant.[27] This of course involves much greater expense to an association. The Laundry Owners' National Association has made arrangements with various firms of accountants in different parts of the country to install the uniform system for its members when their services are desired.[28]

Subsidiary Cost Associations.—The American Pulp and Paper Association organized in 1917 a subsidiary association, known as the Cost Association of the Paper Industry, whose sole efforts are devoted to the study of cost accounting problems and the coördination of their cost system with the steady improvement in technical and factory methods. This association at one time had a special committee consisting of cost experts representing various branches of the industry, its members being subject to call by any member of the association desiring to install a cost system in his plant. This plan, however, has been discontinued, but the members of the association using cost systems permit any member planning to install such a system to visit their plant and examine their records in actual use, a practice which has been found of great value.[29] The refractories manufacturers have likewise organized a body known as the Refractories Accountants' Institute which is comprised of accountants employed by members of the parent association.[30]

Closely akin to the development of uniform cost systems is the education of members into better methods of bookkeeping. In many lines of business, particularly in the retail branches, work of this kind is of the greatest value. The Research Bureau of the American National Retail Jewelers' Association has prepared a book of valuable forms, such as maturity sheets enabling the retailer to check his indebtedness so that he may avoid

[27] *Typothetæ Bulletin*, September, 1918, pp. 2, 9, 25.

[28] *Proceedings*, Thirty-fifth Annual Convention, Laundry Owners' Natl. Assn., 1918, p. 195.

[29] Letter, Thos. J. Burke, Secretary-Treasurer, Cost Assn. of the Paper Industry, Oct. 29, 1921.

[30] *Brick and Clay Record*, Nov. 15, 1921, p. 736.

overbuying, forfeiture of discounts, injury to credit rating; order forms, clearly stating terms and conditions; forms of registration of stock, inventory forms and so on.[31] The use of such forms must induce better business methods. The photo engravers in 1917 also issued a pamphlet prepared by a firm of certified public accountants outlining a simple accounting and bookkeeping system for the members of that association.[32]

It may be possible for an association to secure valuable information and suggestions as to methods from accountants' organizations such as the American Institute of Accountants and the National Association of Cost Accountants. One of the great problems in securing a general adoption of a uniform system is the difficulty of securing the coöperation of accountants employed by members or having more or less direct relations with them.

Suggestions.[33]—The successes of associations which have adopted uniform systems of accounting have demonstrated some facts which should be emphasized.

First, the members of the association should be "sold" on the value of uniform cost accounting to the industry. This involves education as to its benefits with proof from the experience of other industries.

Second, a cost accounting committee composed of members possessing good cost systems should be appointed. A committee of men experienced in cost accounting can make a preliminary survey of accounting conditions in the industry. By reason of their acquaintance with the particular problems of the industry such a committee can be of invaluable assistance in framing the system to meet the needs of the industry.

Third, a cost accountant or a firm of cost accountants of unquestioned ability should be employed to study the industry and develop a practical system in coöperation with the committee.

[31] "Practical Forms," compiled by Research Bureau, American National Retail Jewelers' Assn., 1919.

[32] "General Accounting Policy and Bookkeeping Systems," prepared by Robt. J. McIntosh & Co.

[33] For other suggestions of value, see *Bull. 13*, Fabricated Production Department, Chamber of Commerce of the United States.

They should be given ample time to make a real study of the industry.

Fourth, the system developed should be flexible so that it may be easily used by manufacturers whether large or small.[34] In this way comparable data may be secured from all the members.

Fifth, facilities should be provided in the office of the association for the compilation of cost data for comparative purposes, the cost figures of course being circulated among the members without any recommendation whatsoever from which any agreement to take united action on price or uniformity of costs could be implied.

Legality.—Association action in formulating a uniform system of cost accounting based upon recognized principles of cost accounting and designed to reveal individual cost is beyond any doubt legal; for there is in such action no restriction of competition whatsoever.[35]

But the instant an association takes action to establish *uniform costs* or *uniform elements of cost*, a probable violation of the law is effected.

The Attorney General of the United States states the posi-

[34] The paint manufacturers, for example, have a general system of three interlocking plans. The first, the basis of all three plans, by reason of its simplicity can be successfully employed by the smallest member. The second, or intermediate system is an extension of the basic plan bringing out in greater detail the subdivision of elements of costs. The third is a comprehensive system for the larger companies further subdividing cost factors and giving a more complete control. "Report of Cost Accounting Committee," Paint Manufacturers' Assn. of the United States, Nov. 18, 1920. The Laundry Owners' Natl. Assn. has a somewhat similar system.

[35] Letter, Nelson B. Gaskill, Acting Chairman, Federal Trade Commission, Aug. 2, 1921; see *Bull. 11*, Fabricated Production Department, Chamber of Commerce of the United States.

While the Federal Trade Commission has no lawful authority to furnish advance opinions as to the legality or illegality of any acts under the Anti-Trust Laws and such opinion if furnished cannot therefore be considered as final so far as the possibility of subsequent legal action is concerned, the opinion of the Commission as a body aiding in the enforcement of the Anti-Trust Acts is persuasive. In recent correspondence with the Chamber of Commerce of the United States, the Commission expressed

tion of the Department of Justice toward such action in the following language:

"There is no apparent objection to a standard system of cost accounting but I think associations should be warned to guard against uniform cost as to any item of expense. . . . It is as clearly a violation of the law to agree upon the cost of an item that constitutes a substantial part of the total cost price when its cost actually varies, as to agree upon the sales price, because the sales price is substantially affected by such agreement. It has been ascertained that the members of one association go so far as to fix a uniform cost price, leaving to each member to determine what percent profit he will add, thus eliminating entirely competition in so far as affected by the cost of production." [36]

Uniform cost accounting merely standardizes through recognized and proper accounting principles the methods of all members for determining their *actual individual costs.* Uniform costs on the other hand standardize or fix the largest element in the make up of the price of a commodity and their almost inevitable effect is to enhance the general level of price. Combined action for the purpose or with the effect of increasing prices is unlawful. Activities of associations directed toward the fixing of uniform costs have been rather common and vary from a fixing of a total cost down to the fixing of possibly some element of cost. Sometimes they have had a legitimate purpose; more often their sole purpose has been to increase prices. One association for example has standardized the cost of its members in this way. Labor costs are practically uniform by reason of the general application of the union scale of wage. Indirect or non-productive labor is accounted for by merely doubling the direct labor cost. Figures as to costs of materials

itself with reference to the legality of the use of uniform methods of cost accounting by trade associations in the following language:

". . . It may be said that for a trade association to set up and induce the use by its members of a scientific and accurate plan of cost accounting is not only legal but highly beneficial to the individual members of the association. The use of this legal and highly beneficial information by each individual in establishing his own production cost and determining his own margin is entirely proper."

[36] Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922, Appendix J.

in a number of establishments are secured throughout the country and the average costs of materials determined. The amount of non-productive time is estimated and a fixed percentage established as the average for the industry. The cost of the article is then fixed by the individual member by adding to the average material cost the doubled direct labor cost plus the arbitrarily fixed percentage for non-productive time and this is supposedly his cost. Such a system does not in any way represent the individual's actual cost and is obviously merely a method for increasing and standardizing the apparent cost with the natural result of increasing the general price level. This method as stated by its sponsors produces "surprising results"! With the data furnished by the association, the determination of the members' cost is merely a computation from printed tables furnished by the association which can be made by any clerk and may bear little relation to his actual cost. Other associations have so-called standard cost schedules, uniform estimators and so on, which are clearly intended to increase if not fix prices rather than to enable the individual to find his costs accurately.

Other more indirect methods of price inflation are sometimes evolved in the fixing of single elements of cost. An agreement for example to figure materials at present market value rather than at actual cost when the market has increased will tend to restrict price competition. In the lumber industry where stumpage is a very large element of cost, were the large lumber manufacturers to figure their stumpage cost at the present market value rather than at the purchase price of years ago, plus carrying charges, a much higher level of prices would result.[37] In a similar way an industry instead of establishing fair, accurate rates of depreciation on the various types of plants, machinery and so on, can fix exorbitant allowances for the express purpose of inflating prices and evading taxes. The same can be done with such items as obsolescence and depletion, in fact any items of cost. Association action to educate its mem-

[37] In the recent proceedings brought against the Southern Pine Assn., the government alleges that stumpage costs were inflated by agreement as a device to enhance prices. Petition, *United States vs Southern Pine Assn. et al.*, February, 1921.

bers to pro rate overhead, designed not to determine actual cost but rather to establish a uniform method of fixing individual prices is of doubtful legality.

The government has also challenged the legality of the alleged action of the Southern Pine Manufacturers in agreeing that the "marginal cost" as determined by the cost statements of the members should be used as a minimum basis of selling prices of all the companies.[38] This so-called "marginal cost" consisted of the highest cost of production comprised by the listed figures of the members showing a production sufficient to meet the current volume of shipments and orders as shown by the reports of the members to the association. An association should avoid any action, persuasive or coercive, having to do with the price policy of its members. Averages of costs may often also be used improperly. Their use is of course valuable and proper for the purpose of enabling manufacturers to make comparison with their individual costs and to correct abnormal variances above the average; but they can readily become a modified form of price list especially where the margin of profit in the trade is more or less fixed by custom or agreement.[39] The

[38] Petition, *United States vs Southern Pine Assn. et al.*, February, 1921.

[39] That the government views the use of cost averages with suspicion is evidenced by the letter of the acting chairman of the Federal Trade Commission to the Chamber of Commerce of the United States under date of Oct. 2, 1921, in which appears the following language:

"Stated in another way, the conception of the Commission is that the efforts of a trade association to educate the individual member in the application of sound principles of cost accounting in his individual business, are proper. But that any subsequent effort of the association to reduce the individual costs to an average or uniform cost basis and to procure the use of the group standard as a basis of price making by each of the individuals in the group, is improper. The individual must fix his own cost and his own margin. The group may not attempt to substitute a group average or standard either of cost or margin for the individual's figures without being in peril of becoming an unlawful combination.

"Applying this statement to your interpretation of our letter of the 25th, it may be said that for a trade association to set up and induce the use by its members of a scientific and accurate plan of cost accounting is not only legal but highly beneficial to the individual members of the association. The use of this legal and highly beneficial information by each

instant the cost system is abused, the instant it ceases to reflect actual individual cost, it in spirit violates the law and may easily actually violate it. That there is need for caution in the use of a cost accounting system is shown by the fact that a civil proceeding has been brought and a consent decree entered against the members of one association because of the use of arbitrary and fictitious schedules of cost.[40] In several other proceedings the government alleges uniform cost accounting systems have been employed as part of a general scheme to restrain trade.[41] A criminal proceeding is pending against another, one of the charges in the indictment being the alleged improper use of a uniform cost accounting system.[42]

If the association goes beyond general educational work designed to secure the general installation of a cost system in the industry and gathers, compiles and publishes cost data from its members, the law can be very easily violated. A study of some association records show beyond doubt that the analysis of such data by the cost accountant of the association and the study and discussion of the data by the members in meetings has resulted in tacit agreements to increase prices materially. Even the published proceedings of some associations frankly state that very heavy increases in prices have been thus brought about and urge this benefit upon the membership as a justification of the cost accounting activities. It is needless to point out the il-

individual in establishing his own production cost and determining his own margin, is entirely proper. If thereafter the association attempts to induce its members to disregard their own varying figures and use a common average or uniform figure of cost or margin or both, it has departed from its proper position of instructor and may easily take on the appearance of a price fixing combination in restraint of trade or in suppression of competition." *Bull. 11*, Fabricated Production Dept., Chamber of Commerce of the United States.

[40] *United States vs Kluge et al.* (Woven Label Mfrs'. Assn.), Decrees and Judgments in Federal Anti-Trust Cases, p. 633.

[41] See petition, *United States vs Cement Mfrs'. Protective Assn. et al.*, June, 1921, p. 16; petition, *United States vs Southern Pine Assn.*, February, 1921, p. 13; petition, *United States vs Midwest Cement Credit and Statistical Bureau et al.*, October, 1921, p. 27.

[42] Indictment, *United States vs Jones et al.* (National Coal Assn.), Feb. 25, 1921, pp. 21, 30, 39, 48, 51.

legality of such acts. Any association engaging in such action must know it is unlawful. If cost data is compiled and published by an association for helpful comparative purposes to enable members to increase their efficiency rather than to increase prices, such action is lawful. But only the naked cost data can be compiled. There must be no meetings of members for the joint consideration of this data; there must be no analysis by an expert cost accountant with suggestions of the adoption of cost accounting methods designed to increase the general level of price; there must be no interchange of views between the members which have in them any suggestions or recommendations intended to bring about an inflation of prices through increased estimates of costs; in fact there must be no coöperative action looking toward any limitation of price competition in any way.[43]

[43] This statement is based on the premise that the courts will adopt the same conclusion as to association distribution of cost data that they have adopted with reference to circulation of prices. See *American Column & Lumber Co. et al.* (American Hardwood Mfrs'. Assn.) *vs United States,* 42 Sup. Ct. 114 (1921).

CHAPTER VI

STANDARDIZATION

THE steady development of industries and the social agencies which serve them are constantly creating new conditions requiring readjustment. Improved methods of transportation, lowered costs resulting from more efficient manufacturing processes, bettered methods of distribution, and so on, have brought commodities originally produced in response to peculiar demands into many new markets. While competition has been thus greatly increased through a vast enlargement of the field of distribution of every seller, the variety of commodities offered to the consumer has been multiplied in every market. The great number of non-standardized and sometimes nondescript articles offered for sale directly in competition with each other has created a condition of great confusion and economic waste. The manufacturer has felt himself compelled to enlarge his line to meet the competition of similar articles delivered to his territory and has been burdened with heavy inventories, increased costs, and more difficult conditions, both in production and distribution. The dealer has been compelled to carry larger stocks, assume larger risks and conduct his business at a greater expense. The consuming public confronted with a confusion of trade terms for the same commodity and a lack of anything approaching uniformity in the product offered for sale, has been an easy victim of fraud and deception, and has not only received inferior service, but paid a high price for it. The lack even of a common trade terminology has hampered trade and scientific advancement. Such conditions are obviously wrong. But no individual manufacturer can overcome them. Either the industry itself or the law must afford the relief. If the evil exists, and every one recognizes its existence, should not every industry itself at least attempt to correct it in a practical way, rather than wait for legislation which may stifle

progress and work against the best interests of the industry? A number of trade associations have vigorously attacked this situation, attempting to work out reasonable standards, around which the entire industry may center its efforts in order that the conduct of business may be simplified and needless waste avoided. There are few industries which cannot secure large returns from a carefully considered plan of standardization in some of its forms.

Classification of Standards.—Standardization takes many forms. In each industry the problems may be different, varying with the nature of the commodity, the character of the business, and other factors. In most industries there will be found a need for united action in standardization along one or more of the following lines: (a) Nomenclature, (b) Quantity, (c) Quality, (d) Performance, (e) Practice, (f) Types, (g) Dimensions.

Nomenclature.—A standardization of the exact meaning of trade and technical terms, words and phrases is of great importance. It makes possible the carrying on of trade with a minimum of misunderstanding; it makes it easier to develop a body of useful trade and technical literature; and it enables young men entering business to acquire an understanding of the business more rapidly, with a consequent increase in their value to their employers.[1] Some associations determined to eliminate the ill will, errors and expense resulting from lack of standard terminology on which the minds of traders can meet in all their transactions, have acted to remedy such conditions. Four associations have jointly worked out standard definitions of trade terms in use in the fruit and vegetable industry.[2] The American Association of Nurserymen and the Society of American Florists have a joint committee which, working with the Bureau of Plant Industry of the United States Department of

[1] Statement, H. F. Stratton, Electric Controller & Mfg. Co. *Proceedings,* Assn. of Iron and Steel Electrical Engineers, January, 1921, p. 12.

[2] "Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry," approved by National League of Commission Merchants of U. S., International Apple Shippers' Assn., Western Fruit Jobbers' Assn., American Fruit and Vegetable Assn.

Agriculture, in order to make buying easy has developed a code of scientific names and is developing a code of standard common names to replace the two to a dozen names now often applied to a single shrub or plant.[3] The drug manufacturers, for much the same reason, are working for a standard nomenclature on drugs.[4] The Society of Automotive Engineers has, within the past few years, worked out definitions and nomenclature dealing with storage batteries, in coöperation with the United States Bureau of Standards.[5] The American Concrete Institute has also been working several years to limit the technical meaning of words in order to avoid conflicting usage and errors in specifications.[6] There are many industries which have done nothing in developing a precise business vocabulary and it is usually in these industries that one finds distrust and suspicion rampant. When, for example, in the lumber industry we find one product, long leaf pine, known by at least twenty-nine local or generally used names, there is surely need for a standardization of terms.[7]

Standardization of Quantity.—Technical and scientific in its nature, but of great value to industries, is the fixation of standards of quantity. This involves the fixing of units of measurement, which is basic and essential to the progress of the industry. We naturally assume that the experience of the centuries has long since solved such questions. It is somewhat of a surprise to know there are 23 different bushels in use in the United States.[8] The rapid development of new industries also demands the creation of new standards. The Bureau of Standards is steadily evolving working standards of wave lengths, candle power, color, radio-activity and what not, in coöperation with

[3] "Report of Committee on Nomenclature," *Proceedings*, American Assn. of Nurserymen, 1918, p. 74.

[4] "Report of Committee on Standardization," Seventh Annual Meeting, American Drug Mfrs'. Assn., p. 85.

[5] "Annual Report," Bureau of Standards, 1920, p. 87.

[6] Letter, Harvey Whipple, Secretary, Dec. 6, 1921.

[7] "The Present Lumber Standardization Movement," David G. White, Forest Products Laboratory, *Southern Lumberman*, Dec. 17, 1921, p. 114.

[8] "Industrial Standardization," C. A. Adams, *Annals of the American Academy*, p. 290, vol. 82; "The Work of the Bureau of Standards," P. G. Agnew, *ibid.*, pp. 280, 282.

the various technical organizations and associations and the national laboratories of other countries. Color standards alone are of real interest to railroad officials, oil ripeners, paint and varnish manufacturers, illuminating engineers, dealers in dyes, lithographers, and many other interests.

Standardization of Quality.—The fixing of standards of quality is usually effected through the adoption of standard specifications, either by the buyer or seller. In some instances, because of the nature of the commodity, the adoption of standard tests is also required. Sometimes the test is the standard. Many of the lumber associations have adopted standard specifications, fixing the quality of the various grades of lumber. Approximately 90 per cent of the yellow pine lumber of the states of Texas, Arkansas, Missouri, Louisiana, Mississippi, Alabama, Georgia and Florida is graded and classified according to the rules and specifications of the Southern Pine Association.[9] In fact most of the lumber sold in the United States is sold under association grades and specifications. The Clay Products Association found it necessary to standardize their products because products of an inferior quality reacted severely against the industry in its competition with brick manufacturers, iron manufacturers and others.[10] Standard specifications and tests for cement have been adopted after several years' work by the American Society for Testing Materials, in coöperation with a special committee from the government departments and the American Society of Civil Engineers. Those specifications have been widely circulated by the Portand Cement Association. The cotton seed crushers have carefully worked out uniform grades and tests to place their buying on an efficient basis.[11] The silk manufacturers, working with the technical experts of China and Japan, have worked out some specifications for raw silk, and are gradually evolving an international standard.[12]

9 "Standard Specifications for Grading of Southern Yellow Pine," Copyright, 1920, Southern Pine Assn.

10 *Printers' Ink*, July 22, 1920, p. 116.

11 "Rules Governing Transactions in Cotton Seed and Its Products," Interstate Cotton Seed Crushers' Assn., Thirty-third Annual Session, 1919.

12 "Forty-sixth Annual Report," Silk Assn. of America, 1918, pp. 21, 81 and 83.

The grades of cotton, through the activities of this government, foreign governments, and the various textile associations, have been standardized on an international basis.

Standardization of Performance.—It may be desirable to ascertain averages, or otherwise determine fair standards of operation for machines and other devices as to output, speed and so on. Such an activity can very easily be employed to accomplish an unlawful restriction of production, but on the other hand can be of great value to an industry if properly employed. The Container Club, for example, several years ago began the compilation of statistics on machine output per hour. The reports showing the average for the industry revealed to some manufacturers that their performance was far below the average. The mere ascertainment of a fair standard, even though not fixed or adopted by the association, enabled such manufacturers to greatly improve conditions in their factories. The silk manufacturers have endeavored, by investigation of machinery operation and production, to ascertain the best equipment for each class of goods and the proper standards of machine speed at which each class of material can be produced.[13] Activities along this line involve the possibility of labor troubles, for a steady raising of the general average of production means a burdening and speeding up of labor. But on the other hand fairly determined standards may serve as a sound foundation on which employer and employee can work out a proper wage scale.[14]

Standardization of Practice.—By standardization of practice is meant the fixing of standard uniform methods of construction, installation and operation.[15] Probably the most important form of standardization of this nature is in building construction. The innumerable and varying building codes of our various cities, often enacted as a result of competitive jealousies between industries, have produced a condition of tremendous economic waste and senseless restrictions with a burdensome ultimate cost to the public. Wood, steel, concrete, brick, and

[13] "Forty-sixth Annual Meeting," of the Silk Assn. of America, p. 14.

[14] "Waste in Industry," Report of Federated American Engineering Societies, p. 76.

[15] "Industrial Standardization," C. A. Adams, *Annals of the American Academy*, vol. 82, p. 290.

hollow tile, are all commodities vigorously in competition with each other, and the tendency is for manufacturers of these products to utilize local political influences at the expense of each other. Ignorance, too, of qualities is often the cause of unnecessarily strict municipal regulations. Some industries have, in a measure, been able to avoid some of these difficulties. The American Concrete Institute by the general adoption of a number of standard specifications, has greatly simplified engineering and construction in the concrete field.[16] Its specifications for concrete roads, streets and alleys have been circulated by the Portland Cement Association. The tile manufacturers have published a pamphlet of specifications and contract forms standardizing the details of procedure, with reference to any kind of tile installation, with practically every type of construction.[17] The Department of Commerce in coöperation with the National Federation of Construction Industries and other building associations, is starting a great movement for the standardization of building codes and methods of construction which to the extent it is successful will, beyond doubt, greatly reduce waste, lessen costs, stimulate building, and in every way redound to the public interest.

Standardization of Types, Sizes and Varieties.—One of the most practical fields for standardization is in the establishment of definite sizes or varieties of the product. The enforced standardization of many products required by war agencies with the admitted economic benefits to all factors in an industry resulting from the fixing of standards, has aroused great interest in this work during the past few years. The achievements of some industries have been substantial. The farm vehicle manufacturers by a comprehensive standardization program applied to bodies, wheels, treads, gears and all parts of a wagon, were enabled to reduce the number of varieties of farm wagons from 1,260 to about 90.[18] The National Brick Manufacturers' Association, as early as 1893, adopted five standard sizes for bricks

[16] Letter, Harvey Whipple, Secretary, Dec. 6, 1921.

[17] "Basic Specifications for Tile Work and Related Documents," First Edition, 1921, Associated Tile Mfrs.

[18] "What Simplification Saves Us," Ed. E. Parsonage, *System*, December, 1921, p. 710.

and in 1918 successfully reduced the number to three.[19] The face brick manufacturers have established two standard sizes and over seventy-five per cent of the production of that industry is now manufactured in these two sizes.[20] The paving brick manufacturers, at a joint conference with representatives of the United States Department of Commerce, the United States Chamber of Commerce, and various societies of engineers and architects, state highway officials, and other interests, recently reduced the sizes and varieties of paving bricks from sixty-six to four sizes, of which there are eleven varieties.[21] The car wheel manufacturers in 1909 established three standard patterns for the hundreds of special patterns then used, not only by the manufacturers but by the railroads manufacturing their own car wheels.[22] The writing paper manufacturers, after a great deal of effort, have standardized the size and weight of paper stocks, greatly reducing the number and increasing efficiency of production.[23] Associations have found the standardization of catalogues of such importance from the standpoint of convenience and economy that a number of organizations have united in an effort to secure greater simplification.[24] Indeed, it may be said that commodities such as wheat, cotton, butter, fruit and vegetables, and to a certain extent lumber, have been fairly well standardized, on the basis of a fixed number of varieties, either through legislation or by action of trade bodies.

Standardization of Dimensions.—Probably the most important form of standardization is that directed toward the estab-

[19] Thirty-second Annual Convention, National Brick Mfrs'. Assn., 1918, p. 190.

[20] Letter, R. D. T. Hollowell, Secretary, American Face Brick Mfrs'. Assn., Dec. 22, 1921.

[21] *Proceedings* of Conference for the Simplification of Varieties and Standards for Vitrified Paving Bricks, with the Department of Commerce of the United States, Washington, D. C., Nov. 15, 1921, pp. 7, 8, 11.

[22] "General Survey of the Mechanics of the Chilled Iron Car Wheel," George W. Lyndon and F. K. Vial, p. 7; "Recommended Standards for Chilled Iron Wheels," Assn. of Mfrs. of Chilled Car Wheels, 1917, p. 5.

[23] Address, E. H. Naylor, Secretary, Writing Paper Mfrs'. Assn., *Proceedings*, American Envelope Assn., 1917, pp. 8, 9, 11.

[24] *Printers' Ink*, March 18, 1920, p. 50.

lishment of uniform dimensions. The fixing of dimensional standards in mechanical parts, as, for example, on screw threads, nuts, bolts, standard diameters and so on, can benefit many industries. The German standardization program is emphasizing this feature.[25] The automobile industry has given more attention to this phase of standardization than any other American industry. It has established screw thread sizes, magneto dimensions, tube sizes, felly tolerances, and numerous other standards, the use of which has saved the public thousands of dollars. (Leaflet National Automobile Chamber of Commerce.) The Sanitary Potters' Association by fixing standards of dimensions on certain items of sanitary earthenware has eliminated excess measurements and features which added to the making and selling price.[26] This form of standardization has the advantage of wide applicability attained with little restriction on individuality of product.

Benefits of Standardization.—The benefits of standardization are not theoretical. Based upon reports from one hundred fifty executives and engineers, the Society of Automotive Engineers estimates the automotive industry saved some $750,000,000 in 1920 alone through the use of S. A. E. standards.[27] The standardization of type bodies which cost the type founders over $3,000,000 it is conceded has saved to the industry many times that amount.[28] A reasonable standardization of the products and processes of an industry is of unquestionable benefit to every one. The economic saving, the bettered relations, the increased efficiency, the stimulation of competition resulting, operate to the benefit of the manufacturer, distributor, and consuming public. It may be helpful to outline briefly the advantages which accrue to the various factors in industry from the adoption of a sensible standardization plan.

25 "Notes on Industrial Standardization in Germany," P. G. Agnew, Secretary, German Engineering Standards Committee, June 30, 1921.

26 *Bulletin*, National Federation of Construction Industries, vol. 4, No. 3, March 27, 1922.

27 Letter, C. D. LeFevre, Sections Secretary, Feb. 15, 1922.

28 "Waste in Industry," Report of Federated American Engineering Societies, p. 186.

Advantages to the Manufacturer.[29]—Experience has demonstrated that the following substantial benefits accrue to the manufacturer from the general adoption of a policy of standardization in an industry.

First, such action brings a substantial reduction in the cost of manufacture.[30] The elimination of needless varieties and the concentration on a comparatively few standard products, which become in practical effect staples, facilitate quantity production. The stopping and adjusting of machines for running off special orders is largely avoided, and the productive capacity of the plant correspondingly increased.[31] A drill and seeder factory adopting the standards of its association found the costs for die changing alone decreased from $3.81 per $100 of productive labor in 1917 to $2.86 in 1919-1920.[32] What is more important, the manufacturer can safely produce steadily in advance of the demand when his products are of a kind certain to meet the needs of the consuming market,[33] giving steadier employment to his labor and avoiding abnormal raw material markets. It is trite to say that the ability to produce in quantity tends certainly to reduce cost. The production of a lesser number of varieties inevitably reduces the size of the inventory of raw ma-

[29] For complete statements of the benefits derived from standardization from which the following is largely derived, see "What Simplification Saves us," Ed. C. Parsonage, *System*, December, 1921, p. 709; *Bull. 15*, Fabricated Production Department, Chamber of Commerce of the United States.

[30] Address, G. Brewer Griffin, Manager, Automotive Department, Westinghouse Electric & Mfg. Co., before Motor and Accessory Mfrs'. Assn., July 7, 1922; "Standardization, a Check to Rising Living Cost," *The Annalist*, Oct. 18, 1920, p. 487; *Bulletin*, National Federation of Construction Industries, vol. 4, No. 3, March 27, 1922; *Ninth Annual Report*, Secretary of Commerce, 1921, p. 75.

[31] Address, E. H. Naylor, Secretary, Writing Paper Mfrs'. Assn. before American Envelope Mfrs'. Assn., 1917, pp. 8, 9, 11.

[32] "What Simplification Saves Us," Ed. C. Parsonage, *System*, December, 1921, p. 756.

[33] Address, P. G. Agnew, Secretary, American Engineering Standards Committee, before American Mining Congress, Nov. 17, 1920; Letter, Rudolph Miller, Chairman, Building Officials Conference, Dec. 19, 1921; Statement, C. T. Henderson, Cutler Hammer Mfg. Co., *Proceedings*, Association of Iron and Steel Electrical Engineers of America, 1921, p. 13.

terials, of work in progress, and of the finished product.[34] Less capital is tied up in special machinery, dies, molds and so on. A lessening of the requirements for storage of materials, unfinished and finished, necessarily results.[35] There is a tendency also toward lower prices for raw materials where the demand for the raw materials utilized in the production of standard goods is more stabilized, and in a sense the raw materials themselves standardized by reason of the fixed character of demand. Cost and inspection systems are greatly simplified.[36] In these and perhaps other ways, a substantial reduction of manufacturing costs is made possible.

Second, standardization reduces selling costs.[37] It of course frees the manufacturer from the necessity of tying up unnecessary capital in a large inventory of many varieties awaiting orders. In the farm implement industry three plants by following the standards adopted by the industry so reduced their inventories that their saving in interest charges was $6,000, $27,000 and $90,000 per year, respectively.[38] At the same time this relieves him from the necessity of maintaining needlessly large storage facilities.[39] The handling of a relatively few standard products greatly lessens the chances of errors in shipments which so often result in costly rejections. It lessens clerical work, the work of bookkeeping, billing, and so on. It focuses the interest of the salesmen on a few products, preventing the scattering of effort which flows from the attempt of a salesman to sell an unwieldy line. The cost of samples, of baggage and express charges, and other items is lowered

[34] "American Industry in the War," Report War Industries Board, 1921, p. 67.

[35] *Bulletin*, National Assn. of Lumber Manufacturers; *American Lumberman*, Sept. 11, 1920, p. 71.

[36] "Standardization a Check to Rising Living Cost," Homer Hoyt, *The Annalist*, Oct. 18, 1920, p. 487.

[37] Address, P. G. Agnew, Secretary, American Engineering Standards Committee, before American Mining Congress, Nov. 17, 1920.

[38] "What Simplification Saves Us," Ed. C. Parsonage, *System*, December, 1921, p. 709.

[39] *Bulletin*, National Federation of Construction Industries, vol. 4, No. 3, March 27, 1922.

through the reduction in number of items produced. Because of more compact packing in the cars and larger order units, more frequent shipments in carload lots are possible with a resulting saving in freight.[40] By fixing standard quantities on spools of thread, it was estimated that 600 freight cars per year were saved for more important uses during the war.[41] There is much less likelihood of the manufacturer being caught with a large amount of obsolete products. The craze for novelties in recent years has placed a terrific burden on some manufacturers, especially where the return of the goods unsold at the close of the season is permitted. A standardized line of goods has a permanent value—it creates a consumer appeal which steadily moves them into consumption. The ability to assure prompt delivery makes selling easier, and consequently less costly. Undoubtedly, a close analysis of the benefits of standardization would show many other ways in which it operates to reduce selling cost.

Third, standardization stabilizes the market. It makes valuable and intelligible trade data as to costs, prices, and so on.[42] The exchange of cost, price, production, and similar data on different products is usually worthless, but on standard articles they have a certain value, for on them an accurate comparison of the value offered by competitors may be made. In other words, standardization furnishes one of the mediums by which the manufacturer secures an exact accurate knowledge of market conditions. It has already been pointed out that such knowledge tends inevitably towards stabilization of a kind and character not prejudicial to the public interest.

Fourth, the limitation of the kind and products of an in-

[40] "Standardization a Check to Rising Living Cost," Homer Hoyt, *The Annalist*, Oct. 18, 1920, p. 487.

[41] "American Industry in the War," Report War Industries Board, 1921, p. 66.

[42] Address, C. J. Brand, Chief Bureau of Markets, Department of Agriculture; *Proceedings*, International Apple Shippers' Assn., 1918, p. 159; "The Present Lumber Standardization Movement," David G. White, *Southern Lumberman*, Dec. 17, 1921, p. 113; Letter, Wm. Carver, Architect, Common Brick Mfrs'. Assn. of the United States, Dec. 27, 1921.

dustry ought to tend to concentrate the skill and creative ability of the industry on quality and to result in the production of better goods.[43]

Fifth, the general adoption of standards, including definite nomenclature, permits the development of technical literature in the industry, thus affording a medium for the diffusion of expert knowledge which should result in increasing the efficiency of the personnel, and make possible real achievements in scientific research.[44]

Sixth, standardization unquestionably benefits the manufacturer by bettering trade relations.[45] The various branches of many of our industries are in a state of perpetual distrust and ill will, which is in no small measure due to the lack of standards. In the absence of fixed standards, each party to the dispute believes the other fellow is a crook. The fixing of clear standards would tend to prevent disputes as well as probably prevent deception of the buyer. It would lessen cancellations and litigation, by removing the cause.

Seventh, standardization benefits the honest manufacturer, by making it difficult for the crooked manufacturer to practise deception and dishonesty.[46] So long as a product is unstandardized, there is a large field for deception of the buyer. As soon as definite standards are established and enforced, the manufacturer practising dishonest methods reveals himself, and he finds increasing difficulty in doing business.

Eighth, the simplification of the products of an industry through a clear-cut standardization of grades, qualities, and so on, increases the effectiveness of an industry, in competition

[43] Address, P. G. Agnew, Secretary, American Engineering Standards Committee, before American Mining Congress, Nov. 17, 1920.

[44] *Bulletin*, National Assn. of Lumber Mfrs., *American Lumberman*, Sept. 11, 1920, p. 71; Statement, H. F. Stratton, Electric Controller & Mfg. Co.; *Proceedings*, Assn. of Iron & Steel Electrical Engineers, January, 1921, p. 12.

[45] "Inspection Service and Standardization," C. J. Brand, *Proceedings*, International Apple Shippers' Assn., 1918, p. 159.

[46] "Inspection Service and Standardization," C. J. Brand, International Apple Shippers' Assn., 1918, p. 159; Letter, R. D. T. Hollowell, Secretary, American Face Brick Assn., Dec. 22, 1921.

with other industries.[47] The manufacturers of clay products, as already noted, found it necessary to standardize their products, in order to compete effectively with other producers. The great extent to which bricks have been standardized during the past several years is rapidly giving brick a competitive advantage over wood which still is only partly standardized. The consumer will soon be in a position to buy brick with absolute assurance as to the quality he is getting. Unless he is an expert, he buys his lumber on the assurance of the sellers. Where any competitive articles are involved, it is natural for the buyer, in the absence of any expert knowledge of values, to purchase the standardized products which guarantee to him a certain quality.

Finally, a policy of reasonable standardization appears necessary in many of our industries, if they are to compete successfully in foreign trade. The distance separating buyer from seller in export trade is a severe handicap on business, which the assurance of a fixed standard quality, with equal assurance of ease of replacement and repair, go a long way to overcome. The wide degree of standardization followed in the automobile industry has been an important factor in enabling effective competition of American cars with foreign cars in the markets of the world.[48] We have come to think of quantity production as a peculiar achievement of the American manufacturers. But for seventeen years British manufacturers have operated through the British Engineering Standards Association in fixing standards.[49] This organization bears in mind the common interest of producer and consumer. By direct contact with industrial conditions and working on the principle of voluntary standards, with periodic revisions, it has been a powerful factor in the steel, electrical and automobile industries of that country, which are rapidly developing highly efficient methods of quantity production. A hallmark or brand has been adopted to be at-

[47] "The Present Lumber Standardization Movement," David G. White, *Southern Lumberman*, Dec. 17, 1921, p. 114.

[48] Leaflet, National Automobile Chamber of Commerce.

[49] See Summary of the Work of the British Engineering Standards Association, by E. Le Maestre, Secretary; *Annals of the American Academy*, vol. 82, p. 247.

tached by manufacturers to their goods as an indication they are made in accordance with British standard specifications.

The lessons of the war have given a great impetus to standardization in Europe, and both Great Britain and Germany are carrying on national standardization programs on a large scale. The central organization for standardization work in Germany, the Normenausschuss der Deutschen Industrie, was organized in 1917, growing out of the efforts of the government to increase production and conserve resources during the war. This organization is composed of engineering societies, trade associations, government ministries and over five thousand firms. After full investigation the standard is officially proposed for a fixed period and in the event no important criticisms are received, is widely published as an industrial standard. The Germans recognize the importance of standardization along national lines as a means of furthering competition in foreign trade and realize that the enlargement of their export trade is essential to the rehabilitation of the German industry. They are therefore submerging temporary individual commercial advantages and making rapid strides in their standardization work, in which great emphasis is being given to dimensional standards.[50] American manufacturers must be able to offer advantages to dealers in foreign countries equal to those offered by British and German competition if our foreign trade in many lines is to be developed.

Benefits to Distributors.—Standardization results in substantial benefits to distributors. First, it simplifies buying. Buyers far distant from the seller are able to buy with reasonable certainty as to what they will receive. The fixing of a few clear-cut standards also enables the distributor to buy with greater protection against fraud. To the skilled buyer, which the distributor usually is, this is perhaps not so vital but it simplifies his task and makes inspection easier, by affording him basic tests on standards. He is aided too because he can make an accurate comparison of values and prices when the commodities offered by various manufacturers are produced under the same standards. To the extent that general market data on produc-

[50] "Notes on Industrial Standardization in Germany," June 30, 1921, American Engineering Standards Committee.

tion, shipments, prices and so on are made available, with reference to the several varieties of standard articles, he is given a sound foundation on which to base his buying program. Secondly, standardization reduces the costs of the dealer. He is freed from the necessity of carrying a needlessly heavy stock of many items, tying up an undue amount of his capital.[51] This means too, that he is going to have less shop-worn and obsolete stock; less stock means reduced storage requirements and decreased handling and clerical work. The reduction in varieties carried should make selling easier, not only because it focuses the efforts of the sales force, increasing their efficiency, but also because it does not scatter the attention of the buyer among many items, causing delay and indecision in making purchases. Finally, standardization betters the quality of the service, which the distributor can render to his customers. Manifestly the ability of the dealer to give immediate delivery is increased when he handles a few standard articles which he can carry in stock, rather than a great variety of articles, only a few of which his limited capital will permit him to carry. Even on orders to the factory, he is assured of more prompt delivery and consequently better service to his customers. The problem of supply repairs is also greatly simplified through the interchangeability of parts on a standardized product. With a much smaller investment in parts, the dealer is able to give a much better service.

Benefits to the Public.—A simplified line of products of fixed grades, clearly defined in many industries will, in the absence of improper activities by trade groups, result in great benefit to the public. The mere elimination of needless economic waste of materials and the freeing of capital needlessly tied up is of great public benefit. These alone, combined with the other factors named affecting costs, under a competitive system, ought to result in lower prices to the consumer.[52] The greater availability of the standard articles everywhere, the ease of securing repairs

[51] "American Industry in the War," *Report*, War Industries Board, 1921, pp. 67, 69. *Proceedings*, Thirty-seventh Annual Convention, National Funeral Directors' Assn., p. 55.

[52] "American Industry in the War," *Report*, War Industries Board, 1921, p. 69.

is worthy of consideration. The emphasis on quality which the concentration of the production facilities of an industry would inevitably induce, should result in a superior article. The fixing of standards, backed by some effective method of policing, either by the industry or by the Government, is vital, if the defrauding of customers is to be prevented; for the average consumer has not the time to acquire the expert knowledge of qualities necessary in making the purchase of commodities he rarely buys. As prices increase the need for fixed standards becomes more important.[53] The ability of a manufacturer to produce a stable standardized article steadily and in advance of the demand, by stabilizing employment and increasing the earnings of labor, reduces social unrest, prevents needless privations of labor, and operates to the good of the public. We are rapidly coming to realize too that the maintenance and development of foreign trade is becoming more and more a matter of great public benefit. The judgment of business men in wide experience of export trade is that the standardization of our products is essential to a permanent foreign business.

From a public standpoint too, the tremendous value of standardization in war can in the judgment of high army officials, scarcely be overemphasized.[54] An industry with a standardized production can be made immediately effective for war. The miscellaneous products of an unstandardized industry, create endless confusion, needless expense, and hamper the efficient conduct of modern warfare. The supply branches of the army have therefore adopted as army standards, the standards published by the American Engineering Standards Committee.[55]

Dangers of Standardization.—But there are arguments also against the adoption of too wide a standardization program, which may apply with particular force in certain industries. Standardization should not be carried to such an extent as to destroy initiative and discourage development. Architects, engineers, artists, in fact most of us, want to retain the

[53] "Southern Pine and Reconstruction," *Proceedings*, Southern Pine Assn., pp. 30, 33.

[54] Address, Col. Geo. S. Gibbs, U. S. General Staff, before the American Mining Congress, 1922.

[55] *Washington Herald*, Jan. 2, 1922.

individuality of our work. Nor do we want standards to be fixed, if they are to be taken as the standards for all time. In industries where style and fashion governs, these objections are particularly apt. But there is no conflict between a sensible standardization movement and the free play of originality. In fact a reasonable standardization of products and particularly of dimensions, stifles individuality only in those factors where it is superficial and useless, focusing efforts at originality on factors where it will not do economic harm.[56] An industry standardizing its products must take into account also the real needs of the public and share some of the economies flowing from a simplification program with the public. A general reduction of varieties or styles, without any compensating reduction in price, will only antagonize the public. Too strict a standardization may in fact increase price. Care must also be exercised that in the development of standards, terms are not employed which will operate to the detriment or advantage of particular manufacturers.[57] It has also been contended that standardization makes mass production under conditions of heavy fixed capital the most economical, and as a result tends to eliminate the small manufacturer.[58] This objection, however, appears rather exaggerated.

Procedure.—At the threshold of an attempt toward standardization, an industry must determine the policy and procedure to be followed. Four general methods are possible:

Action by Association Only.—The members of the industry through voluntary coöperation may work out a satisfactory standardization program. Some industries have followed this plan and through committees, and their annual meetings, have gradually evolved a considerable degree of standardization in the industry. The objections to this method are first, that it is difficult in the absence of impartial parties, to secure the necessary unity of action because of competitive fears, and secondly,

[56] Alfred J. Smith, General Manager, Music Industry, Chamber of Commerce, before the Taylor Society, *Printers' Ink*, Dec. 9, 1920, p. 72.

[57] *Proceedings*, Assn. of Iron & Steel Electrical Engineers, January, 1921, p. 14.

[58] "Standardization and Its Relation to Industrial Concentration," Homer Hoyt; *Annals of the American Academy*, vol. 82, p. 271.

it is likely to ignore the interests of other branches of the industry, and of the public.

Coöperation with Technical and Engineering Organizations.—The second method is through coöperation with outside expert organizations. There are organizations of this character which have done work of tremendous value to American industries. The American Society of Testing Materials, is an efficiently organized body of experts, which has developed in coöperation with many industries, standard specifications and tests, which have done much to stabilize conditions of purchase and of use. The American Society of Mechanical Engineers has, after investigation, approved many standards logically coming within their field. The Society of Automotive Engineers, working in coöperation with the four great associations in the automotive industry, has saved the industry and the public heavy sums. The American Institute of Electrical Engineers has developed many standards for electrical machinery and apparatus, its work having been followed to a considerable extent by similar bodies in Europe.[59] The need for a central body of unquestioned impartiality and expertness, through which scientific opinion and business practicalities could be considered and merged into workable standards with the greatest economy of effort, resulted in the creation of the American Engineering Standards Committee in 1918. The technical societies already named, and the American Society of Civil Engineers, were the original founders, but the organization is now made up of official representatives of our leading technical societies, trade associations and governmental departments. Its purpose is to serve as a national clearing-house for engineering and industrial standardization, thereby preventing duplication of work and the formulation of conflicting standards; to promote in foreign countries a knowledge of American standards; and to act as an authoritative channel of coöperation in international standardization.[60] This body is working with representative bodies of Belgium, Canada, Switzerland and England, in the formation of international standards on some products

[59] C. A. Adams, *Annals of the American Academy*, vol. 82, p. 294.

[60] *Annual Report*, American Engineering Standards Committee, 1920, p. 1.

and is closely in touch with the national organizations in all countries working on standardization.[61] Under the plan of this organization, the determination of standards in each industry, is placed in the hands of a technical committee, known as a sectional committee, made up of representatives designated by the various bodies interested. Each committee is practically autonomous in its standardization work, subject only to the jurisdiction of the main committee, the function of which is to see to it that each body or group concerned in a standard shall have an opportunity to participate in its formation. The simplest standards sometimes can be formulated only with the coöperation and consent of many bodies.[62] At the present time ten national organizations are working through this organization in fixing specifications for railroad ties, and more than a dozen national associations are coöperating in formulating standards for elevators.[63] The procedure of the committee also permits of a general correlating committee, representing all branches of an industry. This great organization, in its very short period of existence, has done work of untold value to American industries, and lends its coöperation to any industry where its assistance can be of practical value. It affords the machinery, through which many of our industries can evolve practical standards in an expert and public-spirited way, without governmental interference.

Coöperation with the Government.—An association may bring about standardization through coöperation with governmental agencies. The support of the government is often a powerful factor in effecting simplification. It is recognized that the government is unbiased. Its laboratory facilities for many problems can not be duplicated. Its aid is secured at little expense. The Bureau of Standards of the Department of Commerce for some years has rendered signal service to our industries in the development of many standards. The Bureau of

[61] Address, P. G. Agnew, Secretary, American Engineering Standards Committee, before American Mining Congress, Nov. 17, 1920.

[62] Letter, P. G. Agnew, Secretary, American Engineering Standards Committee, Dec. 2, 1920.

[63] *Annual Report,* American Engineering Standards Committee, 1920, p. 6.

Chemistry and the Forest Products Laboratory of the Department of Agriculture have also been helpful. A number of associations, as has already been described in this chapter, have cooperated with these agencies with substantial benefits to themselves. When a governmental department is a service department, such as the Department of Commerce, rather than a regulatory department, work of unquestioned value can be accomplished in this way. When, however, the department is also a policing agency, there is danger of a demand being made for unreasonably strict standards, suitable for laboratory purposes, but utterly inapplicable to factory production. The Department of Commerce, of course, does not concern itself with regulation, and under the leadership of Secretary Hoover, is emphasizing the economic and business importance of standardization, and working in a fine spirit of coöperation with the trade associations of the country. Any association contemplating work for standardization, in any of its forms, should at the outset communicate with the Department of Commerce, in order to get the benefit of its experience and judgment, resulting from contact with many other trade organizations.

Legislation.—Finally, standardization may be accomplished through legislation. By far the most important legislation of this type is the Food and Drug Act of 1906,[64] under which the Secretary of Agriculture has fixed many minimum standards for food products and drugs. This legislation, while perhaps in some cases arbitrarily administered, has resulted in a great improvement in quality, and a lasting benefit, to the industries concerned and to the general public. The law establishing grading standards for grain [65] has also been helpful in stabilizing conditions in the grain trade and protecting the interests of the producer. Among other laws may be mentioned the apple grading law,[66] the Insecticide Act,[67] the Standard Barrel

[64] Act of June 30, 1906, Ch. 3915, 34 Stat. L. 768, 3 Fed. Stat. Ann. 358.

[65] U. S. Grain Standards Acts of Aug. 11, 1916, Ch. 313, 39 Stat. L. 482, Fed. Stat. Ann. Supp., 1918, p. 7.

[66] Act of Aug. 3, 1912, Ch. 273, 37 Stat. L. 250, 1 Fed Stat. Ann. 237.

[67] Act of April 26, 1910, Ch. 191, 36 Stat. L. 331, 1 Fed. Stat. Ann. 220.

Act,[68] the Standard Container Act and the act authorizing the Secretary of Agriculture to establish standard grades for cotton.[69]

Usually legislation comes as a last resort, only when an industry fails to cope sincerely with its own problems. Most of the federal laws fixing standards have, therefore, been enacted to correct gross evils, which an industry itself failed to remedy. While the power of the government may be of invaluable assistance when there are elements in the industry which prefer to prosper through deception and fraud and the forcing of unpleasant conditions upon competitors, there are strong objections to handling standardization questions through legal enactment, except as a last resort. It increases enormously the difficulties of revision, for not only the industry itself must be persuaded as to the necessity, but also Congress must be convinced of the need as well as of the importance of the legislation, in contrast with any other pending measures. Few standards should ever be considered final. Standardization by law also subjects the industry to regulations, which at times may be theoretical and arbitrary, and utterly lacking in appreciation of the necessities of factory production. The fixing of standards by state laws should be avoided and fought to the limit, for their inevitable effect is to interfere artificially with the free flow of trade, to increase the difficulties of doing business, by the necessity of compliance with many different regulations. They may sometimes stifle competition arbitrarily, with consequent public injury.

Means of Enforcement.—The laws, Federal and State, usually provide adequate means of enforcement and proper penalties. Such enactments as the Food and Drug Act, require a considerable inspection force scattered throughout the country. In the absence of legislation, the enforcement of standards must depend upon the voluntary action of an industry so far as ordinary manufactured articles are concerned. Where compliance with a standard rests solely within the volition of a

[68] Act of March 4, 1915, Ch. 158, 38 Stat. L. 1186, 1 Fed. Stat. Ann. 236.

[69] Agricultural Appropriation Act of March 23, 1908, Ch. 192, 1 Fed. Stat. Ann. 239.

manufacturer about the only method of enforcement is the education of the distributor and the consumer as to the benefits resulting from the use of the standard articles. A common insignia, the property of the association, which may be applied only to products complying with the standard, may effectively tie up with such a campaign of education. Sometimes, too, the effect of the development of fixed standards by a majority of the industries, compels rather surprising changes in the raw material markets; and these changes practically compel recalcitrants to get in line as a matter of business economy. Association standards and grades can also be specified in all contracts. Where the article is inherently difficult to standardize, as, for example, is the case with bulk commodities, such as lumber, coal, and so on, it is necessary to back such standards with an inspection system. Such a system must be efficient and fair, if good-will between buyer and seller is to be maintained. The great lumber associations, such as the Southern Pine Association, the National Hardwood Lumber Association, and others maintain inspection bureaus, which have acquired a wide reputation through the lumber industry. Where goods are purposely sold as of a certain standard when they are in fact off grade, it is probable the Federal Trade Commission has jurisdiction to suppress the practice; for this would seem to be clearly a practice unfair to competitors who sell their products honestly.

Legality of Standardization.—Any reasonable standardization program, evolved in a fair spirit, giving consideration to the judgment of all factors in the industry, and the interests of the public, can scarcely run afoul of the law. There is no doubt that the standardization of sizes and types has in it an element of public danger, in that it establishes common units for price comparisons, thus making price fixing agreements very easy of attainment. The fact that such an activity can be used to accomplish an unlawful end does not, however, make it unlawful. It is the actual use for improper purposes which is unlawful. Standardization should never be used as a cloak for the elimination of the cheaper grades of a commodity, thus forcing only the high-priced goods on the public. The elimination by agreement of the low-priced goods from competition, is probably unlawful. But so long as a reasonable variety of standard

products is offered to the public, including the low-priced goods, and the adoption of the standards results in substantial economic benefits, which are shared with all branches of the industry, and with the consuming public, it is difficult to conceive of an association becoming involved in any legal difficulties so far as the Federal Anti-Trust Laws are concerned. The Attorney General of the United States has expressed the opinion that an association may properly standardize qualities, grades, processes, machinery, and technical terms, as long as such activities are not used as a scheme to curtail production or enhance prices, and do not have the effect of suppressing competition.[70] Any association which projects its standardization program in a fair, competitive spirit need not fear the possibility of prosecution. But any association which attempts to employ this method as a device for the elimination of competition must expect inevitably to be called to account, for the Supreme Court has repeatedly stated that it will not permit a restraint of trade to be accomplished by any subterfuge or indirection.

[70] See letters of Hon. Herbert Hoover, Secretary of Commerce, Feb. 3, 1922, and Hon. H. M. Daugherty, Attorney General, Feb. 8, 1922, Appendix J.

CHAPTER VII

INDUSTRIAL RESEARCH

Value of Research.—The value of organized research, not only to industry, but to the national welfare is receiving wide recognition.

These words of Samuel Gompers, President of the American Federation of Labor, are significant of the broadening attitude of Labor.

"To-day no one disputes the fundamental service which research makes to progress and to maintaining the fabric of civilized life. Whatever help research and science can offer, Labor will welcome." [1]

Indicative of the modern business man's opinion, is this statement of John J. Carty, Vice-president of the American Telephone and Telegraph Company:

"The importance of scientific research to our American industries can not be exaggerated. . . . Enough is already known to justify me in saying, that unless the manufacturers of the United States establish research departments as integral parts of their own internal organizations, our industries will tend to fall behind those of other countries." [2]

Could the attitude of Labor and of Industry toward this great activity be more emphatically stated?

The Facts Fortify Such Opinions.—The remarkable coöperation of science, industry and government in Germany, a story not yet fully told, not only placed that country, within a few years, in the forefront of industrial powers, but also gave her a paralyzing control over great portions of American industry, largely by reason of the exclusive possession of processes and methods evolved from scientific research. The representative of

[1] Leaflet, Personnel Research Federation, August, 1921; issued by National Research Council.

[2] "Science and Industry," John J. Carty, Vice-president, American Telephone & Telegraph Co., *Cir. 8*, National Research Council, p. 2.

the German government, a short time prior to our entry into the war, was able to cable his government that they had in their possession the power to throw out of work four million men in this country.[3] The governments of England, of France, and of Japan, have recognized the tremendous value of organized research to the nation, in times of peace as well as war, and have organized great central research laboratories to serve their industries. The British government maintains that research is "the main, if not the only, source of fresh productivity in industry, and it is only by increased productivity the world will find its way out of its present economic difficulties."[4] There is a world-wide recognition of the importance of science, as a practical working force in furthering national welfare. It is not an exaggeration to say that the future progress of the American industry, to a considerable extent, depends upon the effective application of scientific knowledge, in a practical way, by business men, to the problems of industry. Our great corporations, such as the General Electric Company, the American Telephone & Telegraph Company, the Eastman Kodak Company, and others, maintain great laboratories on which they have spent huge sums for research work. It is recognized by the officers of such great business organizations, that the "contributions of pure science, as a whole, become of incalculable value to all the industries."[5]

One invention in the research laboratory of the E. I. DuPont de Nemours Company effected a net saving to the company of one million dollars in five years. The total expenditures of the DuPont research organization for the years 1912 to 1918, was $6,051,000, and the calculable saving, disregarding those benefits which could not be figured in dollars and cents, but

[3] Address, Francis P. Garvan, former Alien Property Custodian, *Journal of Industrial and Engineering Chemistry*, October, 1921.

[4] *Report*, Committee of the Privy Council for Scientific and Industrial Research, 1920-1921, p. 15.

[5] "The Relation of Pure Science to Industrial Research," John J. Carty, Vice-president, American Telephone & Telegraph Co.; *Science*, October, 1916, vol. 44, No. 1137, pp. 511, 518: or *Cir. 14*, National Research Council; see also address, "Industrial Research," Frank B. Jewett, Chief Engineer, Western Electric Co., before Royal Canadian Inst., *Cir. 4*, National Research Council, p. 3.

which were very important, amounted to $82,401,000.[6] The Western Electric Company's laboratory now occupies a half million feet of floor space in a building especially designed for it and the staff has grown from several trained men to several thousand employees drawn from the universities and research laboratories of the world.[7] Several huge laboratories have been founded by the larger electrical manufacturing concerns and the vast sums spent upon them annually, to quote an authority "return to the industry, and through the industry to the public, improvements in the art which taken altogether have a value many times greater than the cost of their development."[8]

Fifty industries, employing over four million people, are dependent upon the coal tar derivative chemical industry, an industry which is the offspring of scientific research.[9] Indeed many great industries, such as the electrical industry, the cottonseed oil industry and the phonograph industry, have developed as a direct result of effective, continuous research work.

But the huge laboratories of our greatest business concerns cannot be financed by smaller manufacturers. How are the thousands of smaller business enterprises to maintain themselves in competition? They must keep abreast with progress or perish after a long period of futile competition of a type which injures the industry and harms the reputation of the product. They must constantly strive to improve their products and their processes. The only sane course of action is coöperation,—coöperation with their competitors in the trade organization of their industry, and coöperation through that organization with the agencies available for research work.

Numerous associations in this country have engaged in research activities which have reduced costs, enlarged demand, and stimulated progress in the industry. The brick manufac-

[6] "Industrial Benefits of Research," Chas. L. Reese, Chemical Director, E. I. DuPont de Nemours Company, *Cir. 18*, National Research Council, pp. 6, 11.

[7] "Industrial Research," F. B. Jewett, Chief Engineer, Western Electric Co., *Bull. 4*, National Research Council.

[8] "Science and the Industries," John J. Carty, Vice-president, American Telephone & Telegraph Co., *Cir. 8*, National Research Council, p. 4.

[9] H. E. Howe, pamphlet and exhibit, prepared under the auspices of the National Research Council, p. 16.

turers began research work on a small scale in 1898 and even with insignificant expenditures results "of the utmost financial value, which have saved thousands of dollars in losses have been obtained."[10] The English government has adopted its great plan of coöperative research through associations because of its recognition of the value of wisely conducted research in increasing efficiency, reducing costs and enlarging the productivity of the nation.[11]

Field for Coöperative Industrial Research.—The field for coöperative research is almost unlimited.

Library.—One of the simplest activities, not only of great value of itself, but also a necessary basis for any economic research program is the establishment of a complete library of the technical literature of the world as it relates to the industry.[12] Theodore N. Vail has well said "By carefully avoiding a duplication of work and by utilizing all that pioneer investigation has done, the fruitfulness of research can be greatly increased." In the trade and technical publications of the world, there is a vast accumulation of valuable data, setting forth the successful and unsuccessful results of endless researches the world over. This fund of information is practically lost to the world, because of lack of adequate digests and indexes. Costly research work often doomed to failure, is being constantly duplicated as a result. The mere collection, codification, and distribution of such data, as it relates to a particular industry would be of tremendous value. It would substitute the knowledge of the world for the knowledge of the individual manufacturer. It would furnish the starting point for the research work of the industry. The Alloys Research Association, working with the National Research Council, is now accumulating a complete library of metallurgical literature of the world, which is being completely

[10] Address, Edward Ortman, Jr., Twenty-seventh Annual Convention, National Brick Mfrs'. Assn., March 5, 1913.

[11] *Report*, Committee of the Privy Council for Scientific and Industrial Research, 1920-21, pp. 13-34.

[12] "Organization of Industrial Research," Arthur D. Little, *Proceedings*, American Society for Testing Materials, vol. 18, Part II, 1918. Reprint: "Topical Discussion of Coöperation in Industrial Research," National Research Council, p. 24.

indexed. Abstracts of valuable articles, photomicrographs, diagrams and tables, are prepared for the members of the associations so that members may be promptly supplied with all existing information relating to any phase of the subject, and thus keep abreast with the latest technical developments. The whole plan is being worked out in coöperation with the American Institute of Mining and Metallurgical Engineers.[13] One of the activities of the proposed American Dairy Research Institute, to be operated by ice cream manufacturers and milk distributors, is to establish a library of the dairy literature of the world for the use of members.[14]

One of the most important purposes of research, from the standpoint of direct benefit to an industry, is to eliminate waste.[15] Research directed toward this end may take varied forms.

Utilization of By-products.—It may be focused on a more effective utilization of by-products. The comparatively recent growth of great industries, such as the dye industry, the cotton seed oil industry, the vegetable oil and margarine industry, the fiber container industry, and many others, which have been developed almost entirely on the utilization of waste by-products emphasizes the possibilities. The degree of waste in many industries due to an incomplete utilization of the raw material is appalling. Eighty per cent or more of the total value of the trees of our forests, exclusive of roots, small branches, twigs, fruits and foliage, is waste, a considerable part of which is avoidable.[16] One engineer reports that the value of products recoverable from the waste from cut-over timber lands of the south amounts to nearly $700 per acre.[17] One of the most im-

[13] See pamphlet, "Alloys Research Association," published by National Research Council.

[14] *Report*, Laboratory Committee, *Proceedings*, National Assn. of Ice Cream Mfrs., 1921.

[15] A comprehensive study of the many forms of waste in typical industries is presented in the report of the Committee on Elimination of Waste in Industry of the Federated American Engineering Societies, entitled "Waste in Industry," McGraw-Hill Book Co.

[16] "Utilization vs Elimination of Wood Waste," Arthur T. Upson, Forest Products Laboratory, *Southern Lumberman*, Dec. 17, 1921, p. 15.

[17] "A Potential Industrial Empire," Joseph H. Wallace, *Southern Lumberman*, Dec. 17, 1921, p. 123.

portant phases of the research work of the Forest Products Laboratory, conducted in coöperation with numerous associations of the lumber industry, is directed toward the utilization of waste materials. It has worked out numerous uses for wood waste and by establishing contact between possible users and the sources of supply is doing work of benefit to the lumber industry.[18] Through the coöperative efforts of the Interstate Cotton Seed Crushers, working with various research agencies, the commercial use of cotton linters for the manufacture of paper has been successfully developed.

Improvement of Processes.—The improvement of processes through research may also aid in the prevention of waste. The research laboratory of the DuPont Company, during the first year of its existence, developed a method for greatly reducing the time required for separating nitro-glycerine from the waste acids, which not only was worth at least a million dollars to the company, but also greatly increased the safety of the operation.[19] The Laundry Owners' National Association, with the assistance of the Mellon Institute, has been developing improved power laundry methods which are being made available to the entire industry on the theory that the larger plants suffer from the ill-will created by inefficient methods of poorly managed plants.[20] The Technical Association of the Paper and Pulp Industry is devoting a considerable part of its work to the improvement of mill engineering and processes of paper making.[21] Improved methods of turpentining developed by the Forest Products Laboratory, it is estimated, has effected a saving of $4,000,000 a year.[22] The manufacturers of glass containers are conducting experiments with processes of sterilization, pasteurization, and so on, to determine the most efficient methods of

[18] "Utilization vs Elimination of Wood Waste," Arthur T. Upson, Forest Products Laboratory, *Southern Lumberman,* Dec. 17, 1921, p. 157; see also *Technical Notes* published by Forest Products Laboratory.

[19] "Industrial Benefits of Research," Chas. L. Reese, *Circular 18,* National Research Council, p. 4.

[20] "The Laundry Chemist and The Pure Fabric Law," H. G. Elledge, *Chemical Age,* May, 1920.

[21] Letter, Wm. C. MacNaughton, Secy-Treas., Nov. 30, 1921.

[22] "Industrial Scientific Research in the Forest Products Laboratory," published by the Forest Products Laboratory, 1920, p. 16.

packing.[23] The Container Club is devoting considerable research work to the improvement of fiber containers and the designing of improved containers for new commodities.[24]

Determination of Properties.—Again, research may be employed to determine the quality and characteristics of a particular product and thus avoid wasteful uses. The work of the Forest Products Laboratory on the mechanical properties of wood has permitted a 20 per cent increase in allowable working stresses in structural timbers, making possible a saving of $40,000,000 annually through a more economic use of timbers in construction work.[25] The research work of the Magnesia Association of America at the Mellon Institute is in part devoted to a determination of the most economic use of material for heat insulation.[26]

Reduction Transportation Wastes.—The elimination of waste in transportation is also engrossing the attention of research departments of many organizations. Losses resulting from inefficient packing, from improper handling, from unnecessary consumption of space, reach huge totals. The class "I" roads of the United States in 1919 paid out $106,804,861 for loss and damage to freight.[27] The daily loss of shippers and manufacturers is estimated by the Forest Products Laboratory to amount to $500,000, due to poor packing and to expensive and improperly designed containers for all classes of domestic and foreign shipments.[28] In 1915, the laboratory coöperating with the National Association of Box Manufacturers and the National Wholesale Grocers' Association, instituted a program of re-

23 Letter, A. W. Bitting, Director of Research, Glass Container Assn., June 24, 1921.

24 "Industrial Research in the Fibre Container Industry," J. D. Malcolmson, *Chemical Age*, September, 1920.

25 "Industrial Scientific Research at the Forest Products Laboratory," published by Forest Products Laboratory, 1920, p. 14.

26 "Industrial Research at Mellon Institute," Wallace Savage, *Chemical and Metallurgical Engineering*, Feb. 11, 1920. The Refractories Mfrs'. Assn. is likewise working out, through scientific experiments, the proper specifications for refractories.

27 *Traffic World*, vol. 27, No. 2, p. 69.

28 Leaflet, Boxing and Crating Training Course, Forest Products Laboratory.

search and mechanical tests to improve containers then in use. This work has resulted in the redesigning of containers, giving increased strength, decreased use of materials, decrease in cubic contents, security against pilferage, reduced labor and cost of manufacture, decreased transportation cost and has permitted improved methods of handling freight.[29] The work of the laboratory along this line saved the Government millions of dollars during the War. The redesigning of a container for saddle soap alone saved the Government $414,000 in freight charges on the first shipment and the use of the containers designed by the laboratory reduced the loss caused by breakage and box failures on shipments to Europe to 15 per cent of what it had been previously.[30] It is estimated that an average saving of 35 per cent can be made on all package shipping.[31] The Bureau of Industrial Research, which worked with the Forest Products Laboratory and other organizations, during the war, estimates that millions of dollars were saved in packing materials and many more millions of valuable tonnage and cargo space conserved by the development of improved containers.[32] The Glass Container Association is making a study of packing to reduce breakage and conserve space.[33] The American Association of Ice and Refrigeration and the American Railway Perishable Freight Association, are investigating packing methods, causes of diseases of fruits and vegetables, causes of loss in transit, and best methods of refrigeration, in order to lessen the heavy loss or deterioration of perishable commodities in transportation.[34]

Standardization.—Research may be, and often is, a prerequisite to the standardization of products, materials, equip-

[29] *Ibid.*

[30] "What We Learned About Wood," Anthony M. Rood, reprint from *Saturday Evening Post,* published by Curtis Publishing Company.

[31] *Ibid.*

[32] *Official U. S. Bulletin,* January 22, 1919.

[33] Letter, A. W. Bitting, Director of Research, June 24, 1921.

[34] See *Circular 473 A,* American Railway Perishable Freight Assn., Feb., 1918; also *Information Bulletins,* American Assn. of Ice and Refrigeration.

ment and performance, the value of which was discussed in the preceding chapter.

Labor.—Industrial research as it affects personnel may be of great importance to an industry. The high labor turnover, the assignment of men to jobs for which they are not fitted, the conditions of work, unemployment, wage payment, union regulations, and what not, are productive of tremendous wastes.[35] There has recently been organized the Personnel Research Federation, consisting of such organizations as the National Research Council, the American Federation of Labor, the Engineering Foundation, federal government bureaus, leading universities and many of our largest corporations, to study the wastage due to maladjustments of workers to their task, undesirable working conditions, unemployment, and the like, which are causing vast economic and social loss.[36] At the conference at which this federation was organized, Samuel Gompers placed labor on record as recognizing the great value of research of this character, provided it were not directed merely toward the speeding up of the workmen.

Improvement of Quality.—Again, technical research is necessary to the steady improvement of the quality of the product. Better quality is usually secured only as a result of continuous experimentation. The National Canners' Association has for some years conducted extensive research work on the problems affecting the quality of canned goods with substantial results.[37] The Metal Ware Manufacturers' Association of America is working with the Bureau of Standards to discover effective means of correcting certain defects in their products.[38] In fact a number of associations could be named whose research work is directed in part toward the improvement in quality.

[35] See "Waste in Industry," by Committee on Elimination of Waste in Industry of the Federated American Engineering Societies, pp. 13, 26, 79, 82, 158, Chaps. 11 to 14 and 16.

[36] Leaflet, Personnel Research Federation, August, 1921, issued by the National Research Council.

[37] See, *Bulletin,* Research Laboratory, National Canners' Assn.

[38] *Annual Report,* Director, Bureau of Standards, 1920, *Misc. Publication 44,* p. 260.

Improvement of Equipment.—The development of more efficient equipment can also be made a problem for solution through common effort by a coöperative research organization.[39] More than one industry is working with antiquated equipment merely because the attention of the industry has not been focused by united action on the development of better machinery.

Development of New Uses.—Still another important function of research work is to develop new uses for a product, thereby making possible an enlargement of demand to the common benefit of the public and of the industry. The Gypsum Industry Association, for example, is maintaining fellowships at five universities and colleges, for investigation as to the value of gypsum in improving soil and maintaining its fertility.[40] The manufacturers of cement, of lumber, of brick and of lime, are making a constant study to develop new uses to which their commodities can be put.

Improvement Methods of Use.—A closely analogous use of research is to develop better methods of use of the product by the consumer. The coffee roasters are conducting experiments at the Massachusetts Institute of Technology designed to discover the best method for the preparation of coffee in the home.[41]

Protection Against Fraud.—An industry may also find its research organization of value by making its service available to the individual members for the analysis of raw materials, purchased by them, thus protecting them against fraud. The research laboratory employed by the Container Club and by the Laundry Owners' Association, perform this service for the members of these associations.[42] Effective work may be done in bringing about the standardization of quality of raw materials.[43] Or such work may be of great value to an association in bringing

[39] Much attention is being given this subject by the American Assn. of Refrigeration; see *Proceedings*, Sixth Annual Meeting, 1916, pp. 95, 151.

[40] Letter, H. H. MacDonald, Secretary, July 13, 1921.

[41] *The Spice Mill*, Nov., 1921, p. 1934.

[42] "Industrial Research in the Fibre Container Industry," J. D. Malcolmson, *Chemical Age*, September, 1920; "The Laundry Chemist and the Pure Fabric Law," H. C. Elledge, *Chemical Age*, May, 1920.

[43] *Monthly Digest*, National Varnish Mfrs'. Assn., December, 1920, p. 2.

about the discovery of new raw materials as substitutes for those of which there is a shortage.[44]

Protection of Good Will.—Research may also be a real factor in preserving good-will. The widespread adulteration of textiles, has added many difficulties to the operation of power laundries. Many claims for damage, due entirely to the quality of the textile or the use given it by the owner, are constantly being made. A refusal to pay such claim without clearly establishing the responsibility for the damage antagonizes customers. The laundry owners therefore have utilized their research laboratories for making tests in such instances, in order that convincing proof may be given the customer as to who is really responsible for the damage. Many cases of adulteration of fabrics, sales of seconds as firsts, defective weaves, etc., are thus discovered and the blame placed where it belongs.[45] The coffee roasters, as has already been described, are conducting investigation at the Massachusetts Institute of Technology, with reference to the properties of caffeine with the idea of correcting existing misconceptions in the public mind which tends to prevent a larger sale of coffee. The shingle manufacturers and the cotton seed crushers have carried on research work for a similar purpose.[46]

Research Methods.—The trade association entering upon a program of coöperative research, has a variety of methods and agencies through which to continue its work.

Papers and Discussions.—The simplest method is merely to assign a considerable portion of the program at its regular meetings to the presentation and discussion of papers on research problems by individual members. The papers presented at the meetings of the American Iron & Steel Institute are a perma-

[44] *Report of Scientific Section*, Educational Bureau, Paint Mfrs'. Assn. of the U. S., 1920, p. 5.

[45] "The Laundry Chemist and the Pure Fabric Law," H. G. Elledge, *Chemical Age*, May, 1920; "The Conservation of Textiles" by H. H. Elledge and Alice L. Warefield, published by Laundry Owners' Natl. Assn., pp. 5-7.

[46] J. H. Eddy, Second Annual Meeting, Southern Pine Assn., p. 177; Jo. W. Allison, Nineteenth Annual Session, Interstate Cotton Seed Crushers' Assn., 1915, p. 96.

nently valuable addition to the literature of the industry.[47] The cotton manufacturers devote a large part of their regular meetings to technical papers, awarding a medal each year to the person whose paper represents the greatest contribution toward the improvement of cotton manufacture.[48] It is felt that the reading of papers before the association where they are subject to challenge and discussion is very helpful. The drug manufacturers have organized their research work under the direction of a Central Control Committee which lays out the program under which nineteen sub-committees conduct research work on special problems and classes of drugs.[49] This method, while it is inexpensive, has grave defects. Research under this method usually lacks force, direction, and continuity, and permits of the concealment of important discoveries made in the laboratory of an individual member.

Subsidiary Associations.—Again, a subsidiary association or an independent association may be organized to confine its activities exclusively to research work. The paper and pulp industry has organized such an association which is engaged in research in mill engineering and chemistry of paper. It has not only published a number of papers and books on the principles and processes of paper and pulp manufacture, but has also cooperated with various Governmental Agencies in research work of value.[50] Its work is recognized by the parent association of manufacturers as laying a foundation of correct knowledge sorely needed in this industry.[51] The American Oil Chemists' Society, an independent organization closely affiliated with the

[47] See *Yearbook*, American Iron & Steel Institute, 1916.

[48] *Transactions*, National Assn. of Cotton Mfrs., 1916, p. 71. This method is employed by the following associations, among others; see National Assn. of Ice Cream Mfrs., *Proceedings*, 1919; American Assn. of Refrigeration, *Proceedings*, 1919; National Brick Mfrs'. Asso., *Proceedings*, Thirty-second Annual Convention, 1918; American Railway Bridge & Building Assn., *Proceedings*, Twenty-seventh Annual Convention, 1917; American Mining Congress, *Proceedings*, 1919.

[49] *Proceedings*, Seventh Annual, American Drug Mfrs'. Assn., p. 80.

[50] Letter, Wm. C. MacNaughton, Secy.-Treas., Technical Association of the Pulp and Paper Industry, Nov. 30, 1921.

[51] Geo. W. Sisson, Jr., President, American Paper and Pulp Assn., Forty-second Annual Meeting, Feb. 6, 1919.

Interstate Cotton Seed Crushers' Association, has developed important methods of edible oil refining and of converting former wastes into profitable products, the research work being conducted in the laboratories of individual members.[52] The American Ceramic Society originally formed from the membership of the National Brick Manufacturers' Association, has developed into a great organization of international reputation, which has developed by far the largest fund of technical information on clay in the English language.[53]

The producers and users of metals and alloys, working with the National Research Council, have organized the Alloys Research Association, which is compiling the scientific literature of the world on subjects of direct interest to the members, with the purpose of later engaging also in technical research into fundamental questions affecting these products.[54]

Commercial Laboratories.—Another mode of procedure is to employ the services of a commercial laboratory. There are several large commercial laboratories experienced in industrial research, which are adequately equipped and efficiently supervised.[55]

Coöperation with Educational Institutions.—A third method of conducting research work is through the universities and technical schools. Some of our schools possess magnificent laboratories and faculties, whose members are scientists of the highest standing. Graduate students working under the supervision of scientists of established reputation, in intimate contact with the industry through the research committee of an association, have made practical contributions to American industry. The Portland Cement Association conducts research work in the properties of concrete and concrete materials at

52 Letter, Thos. B. Caldwell, Secy.-Treas., American Oil Chemists' Society, Nov. 23, 1921.

53 Address, Edward Orton, Twenty-seventh Annual Convention, National Brick Mfrs'. Assn., March 5, 1913.

54 *Pamphlet,* Alloys Research Association, published by National Research Council, November, 1920.

55 For a list of commercial and other laboratories doing industrial research; see Topical Discussion on Coöperation in Industrial Research, *Proceedings,* American Society for Testing Materials, vol. 18, Part II, 1918, reprinted by National Research Council.

the Lewis Institute. The control of the laboratory policy is in the hands of a committee of four, consisting of two professors of the Lewis Institute and two representatives of the Association, the research work being carried on by a staff of engineers and chemists devoting their entire time to this work.[56] The Laundry Owners' National Association, the Container Club, the Refractories Manufacturers' Association, the Magnesia Association of America, the Leather Belting Exchange, and other associations, have for several years conducted research work of the most varied kind at Mellon Institute, a great scientific laboratory.[57] Some 165 patents have been secured as well as more general benefits obtained, as a result of research work at this institution.[58] The Coffee Roasters' Association are utilizing the research laboratory of the Massachusetts Institute of Technology, in carrying on research work on the physiological effects of caffeine, proper methods of preparing coffee and so on.[59]

The Tanners' Council of the United States has begun research work at the University of Cincinnati to improve present methods of tannery operation.[60]

The Department of Mechanical Engineering, of the University of Illinois, is conducting special research work in cooperation with the National Warm Air Heating and Ventilating

[56] *Bull. 2,* Structural Materials, Research Laboratory, Lewis Institute, May, 1919.

[57] "Industrial Research in the Fibre Container Industry," J. D. Malcolmson, *Chemical Age,* September, 1920; "Industrial Research at Mellon Institute," Wallace Savage, *Chemical and Metallurgical Engineering,* Feb. 11, 1920.

[58] *Eighth Annual Report,* on Industrial Fellowship of the Mellon Institute, 1921, p. 14.

[59] *The Spice Mill,* November, 1921, p. 1934. At this institution the method of handling research work is as follows: A contract is made to place a certain man or men on a certain problem for a specified period, usually one year. The Association pays the laboratory approximately twice the total cost of the man engaged directly on the work, pays his necessary traveling expenses and the cost of any extraordinary apparatus. The laboratory assumes the cost of all ordinary chemical expenses, apparatus, supervision and overhead charges. All data, results, or patents, resulting from the work belong to the Association; Letter, Robert E. Wilson, Director to J. K. Jessup, Jessup Mfg. Co., June 7, 1921.

[60] *Shoe and Leather Reporter,* Jan. 5, 1922, p. 41.

Association, the work being financed by the Association.[61] Under the agreement made with the University, the Association pays $8,000 per annum, the University agreeing to furnish two full time and one one-half time assistant, and the supervision of its engineering faculty. An advisory committee of the Association, with the professors of the engineering station, determine upon the general program to be carried on. A number of associations maintain fellowships at various Universities.[62] There are some very substantial advantages in utilizing the services of our technical institutions for research work. The cost of conducting work in this manner involves much less expense than the maintenance of a laboratory. In addition, the large equipment, the library facilities and the supervision of trained scientists, who are members of the faculty, are secured at a nominal cost. Finally, a closer relationship between the educational institutions and industries in work of this character will aid greatly in the training of high-class research men, and greatly improve the quality of technical men entering our industries from our Universities and Colleges.

Coöperation with Government Departments.—Still another method is coöperation with one of the various Governmental Bureaus, such as, the Bureau of Standards, the Bureau of Chemistry, or the Forest Products Laboratory. These organizations do research work of an extensive character. The Bureau of Chemistry, of the Department of Agriculture, has, at different times, coöperated with various industries in varied research work, such as, the development of a water resistant fiber container, the utilization of certain fruit by-products, the deter-

[61] "Report of Progress in Warm Air Furnace Research," A. C. Willard, *Bull. 112*, Engineering Experimental Station, University of Illinois, May 19, 1919.

[62] The following associations have research arrangements with the following institutions: Assn. of Mfrs. of Chilled Car Wheels, University of Illinois; National Pickle Packers' Assn., University of Wisconsin; Hawaiian Pineapple Packers' Assn., University of Hawaii; Olive Assn., Leland Stanford, Jr., University; Letter, Robt. M. Yerkes, Information Service National Research Council, March 19, 1920. The Gypsum Industry Assn. finances five fellowships at state institutions. Letter, H. H. MacDonald, Secretary, July 13, 1921.

mination of tin plate best fitted for food containers, and so on.[63] Investigations of refrigeration problems have also been made by the Bureau of Plant Industry of that department.[64] The Bureau of Standards, of the Department of Commerce, for years has carried on with many of the trade associations of the country coöperative research work of enormous value.[65]

The Bureau, during the war, secured large appropriations for research work and made great contributions aiding in the successful prosecution of the war. As a result, it greatly enlarged its facilities until now it is one of the great research laboratories of the world.

The Forest Products Laboratory, of the Foresty Service, is another great governmental organization coöperating with our industries, particularly with the lumber and wood-using industries of the country. The laboratory has acquired, through years of research, a wealth of data on the quality and uses of woods and has done work of the greatest value designed to secure a more economic utilization of our forests. It is conducting research work in kiln drying, wood preservation, pulp

[63] *Annual Report*, Bureau of Chemistry, February, 1918, p. 16; *ibid.*, 1919, pp. 13, 20.

[64] Sixth Annual Meeting, American Assn. of Refrigeration, 1916, p. 95.

[65] In 1920, for example, to mention only a part of the research work of this great laboratory, the Bureau conducted research work with the American Railroad Assn. on railroad signal batteries, with the National Electric Light Assn., and the American Gas Assn. in the formulation of safety codes in these industries, with the Paint Mfrs'. Assn. for the determination of specific gravities and bulking figures of pigments, with the Coated Textile Mfrs'. Assn. in the properties of artificial leather, with the National Assn. of Wool Mfrs. in the standardization of dye stuffs, and the effects of blending shoddy or cotton with virgin wool, with the U. S. Potters' Assn. in the use of American clays, with the National Terra Cotta Assn. in testing the qualities of terra cotta, and with the National Metal Ware Mfrs'. Assn. and American Ceramic Society on defects of enamels for sheet steel; "Annual Report," Director, Bureau of Standards, 1920, *Miscellaneous Publications 44*, pp. 57, 74, 87, 163, 209, 214, 256, 258 and 260. The brick manufacturers secured the aid of the Bureau in determining the strength developed by brick piers. The cotton seed crushers have elected its aid in the determination of color reading of cotton seed oil. *Proceedings*, National Brick Mfrs'. Assn., 1918, p. 61, Twentieth Annual Session Interstate Cotton Seed Crushers' Assn., 1917, p. 110.

and paper manufacturing, the development of efficient containers, and many other problems. Its study of water resistant glues and plywood for aeroplanes saved the Government $6,000,000 in a twelve-month period, and the present total annual saving to industry, resulting directly from the work of the laboratory, is roughly estimated to be more than $30,000,000.[66]

The arguments for the use of governmental agencies in trade associations research work are its economy, its impartiality, and in some instances, possibly its greater efficiency. In some instances, if the work is of sufficient importance to involve the public interest, appropriations may be secured from Congress to conduct such work. On the other hand, the danger involved in the use of governmental agencies is that results secured may be used for purposes of regulation. This would not be serious were it not for the fact that some divisions of the government, in the past, have refused to recognize the practical and insurmountable difficulties of factory operation, and based their regulations entirely upon laboratory experiments. A narrow policy of this kind can work very serious hardship on an industry.

Association Research Laboratories.—An association adequately financed, if it so desires, may maintain a research laboratory of its own. The canners, in the early development of their industry, were confronted with grave problems, such as spoilage, faulty color of food, container imperfections and defective machinery. The results of investigation by governmental bureaus, and independent laboratories, emphasized the need of more extensive research. Individual laboratories in the industry, it was recognized, would be impracticable and wasteful. A central laboratory was therefore created, which not only engaged in research work of a varied character, but also coöperated with other laboratories and became an integral part of a nationwide inspection system which the association has developed. Acting in coöperation with the National Research Council, an exhaustive study is being made of ptomaine poisoning, under the direction of six of the most eminent scientists of the country, whose services could not have been secured by the in-

[66] "Industrial Scientific Research at the Forest Products Laboratory," published by the Forest Products Laboratory, 1920, p. 16.

dustry, except through the agency of the Council.[67] The American Association of Creamery Butter Manufacturers has for years maintained a laboratory devoted to the study of improved methods of handling cream and better methods for the manufacture of butter. The ice cream manufacturers and the milk distributors are now organizing a joint research laboratory.[68] A research laboratory of this character has certain benefits. It gives to the industry a closer control of the research program. Discoveries made may be preserved for the confidential use of the members of the association, who pay the expenses of the laboratory work. The danger of impractical demands being made upon the industry by regulatory bodies is also in a measure avoided and the industry afforded an agency to present comprehensive scientific data in opposing ill-timed regulations.

Safeguards Against Failure.—The experiences of associations here and abroad suggest the following warnings to those organizing the research plans of an association:

First, the work should be financed at the outset for a period of several years. The largest results accruing from research are often the slowest to be achieved. There is always a tendency for members to be discouraged, particularly when they are only one-half sold on the value of such work.[69] The research organization should be carefully protected from outside interference, and purely destructive criticism, even though their work re-

[67] "Coöperative Research in the Canning Industry," Frank E. Gorrell, Secretary, National Canners' Assn., *Proceedings*, American Society for Testing Materials, vol. 18, Part II, 1918, reprinted in pamphlet form by National Research Council.

[68] "Report of Laboratory Committee," *Proceedings*, National Assn. of Ice Cream Mfrs., 1921; other associations which are maintaining research laboratories are—The American Assn. of Woolen and Worsted Mfrs., American Gas Inst., American Paper & Pulp Mfrs'. Assn., Assn. of Metal Lath Mfrs., Gypsum Industries Assn., National Brick Mfrs'. Assn., National Lime Mfrs'. Assn., Paint Mfrs'. Assn. of the United States, National Electric Lamp Assn., and Portland Cement Assn.; "Development of Existing Agencies," Alfred D. Flynn, Secy. United Engineering Society, Engineering Foundation, *Proceedings*, American Society for Testing Materials, vol. 18, Part II, 1918, published in pamphlet form by National Research Council, p. 43.

[69] See *Report* of Committee of the Privy Council for Scientific and Industrial Research, 1920-21, p. 15.

mains unremunerative for several years.[70] Results from research work cannot be secured in the same manner as commodities are produced in a factory.

Second, the direction of the scope of the work should be controlled by the industry through a special committee, especially qualified for such work. Government control or the control of scientists may lack force and fail to give the practical results the business man demands.[71]

Third, an initial comprehensive survey of the field of possible research through conferences and correspondence with members of the industry and technical men should be made, in order that the research program may be directed into the most important channels.

Fourth, a comprehensive library of the literature of the world on the subject matter affecting the industry should be gathered so that needless research work and waste of funds may be avoided.

Fifth, there should be an insistence that a considerable portion of the work be directed toward fundamental research problems. Such work, while often non-productive of results for a period of years, can suddenly produce results which may revolutionize an industry.[72] The real progress of commerce demands that attention should not be given solely to the questions which have an immediate dollar and cents value.

Sixth, as much publicity as possible, consistent with the protection of the interests of the members, should be given, in order to secure the public criticism of investigations, which may be a stimulus to progress.[73]

Seventh, it is desirable for the association, if possible, to do research work for individual members at cost, as the constant presentation of individual problems keeps the association

[70] JOHN C. CURTIS, "Scientific Research for the Linen Trade," Wm. Strain and Sons, Ltd., p. 51.

[71] See *Report* of Committee of the Privy Council for Scientific and Industrial Research, 1916-17, p. 49.

[72] *Report* of Privy Council for Scientific and Industrial Research, 1920-21, p. 33.

[73] *Report* of the Council Linen Industry Research Assn., 1921, p. 8.

in close touch with the difficulties of the trade and helps in the selection of subjects on which research will be of general benefit to the industry.[74]

Finally, provision should be made for frequent meetings between the members of the industry and those conducting the research work through rotating committees, or other means, in order that interest may be maintained.[75]

National Research Council.—In 1916, a great national research organization, known as the National Research Council, was effected, at the request of President Wilson, to coördinate scientific effort with the war program of the government and with industry.[76] It was comprised of the chiefs of the technical bureaus of the Army and Navy, the heads of the government bureaus engaged in scientific research and a large group, representing educational institutions, research foundations, and representatives of industrial and engineering societies. Working with the leading engineering and scientific organizations of the country, the Council did work of incalculable value during the war. Plans have been effected for continuing it as a peace organization and some of our largest corporations and industries have contributed substantially to its support. It is a democratic organization, the members of the council being elected by the forty great engineering societies, which in turn represent thousands of individual members. It is becoming the great national clearing-house for scientific information regarding research work completed, or being conducted anywhere in the world. It is working to coördinate the research work of scientific research organizations and industries. It proposes also to afford the means whereby the scientists of the country may cooperate in an advisory way with industries and also to furnish an agency for the development of a better trained research per-

[74] *Report* of Council British Research Assn. for the Woollen & Worsted Industry, 1921, p. 3; see also *Prospectus*, British Empire Sugar Research Assn., p. 10; *Report* of Privy Council for Scientific & Industrial Research, 1920-21, p. 32.

[75] *Report* of Council Linen Industrial Research Assn., 1920, p. 8.

[76] *Pamphlet*, National Research Council, Divisions and Committees, 1918; published by National Research Council, p. 3.

sonnel.[77] To the extent its plans are achieved, this organization promises to exercise a great influence on the industrial future of the country and any trade association planning a research program should investigate the possibilities of coöperation with it.

Association Research in Foreign Countries.—The importance of industrial research as a factor in maintaining and forwarding the economic position of nations is becoming recognized the world over. The correlation of science and industry in Germany is a matter of common knowledge. The Belgian government is establishing a Research Institute for the perfecting of manufacturing processes; Czecho-Slovakia is creating an Academy of Labor, the chief purpose of which is the organization of technical work; Holland is carrying on industrial research work, under the direction of the Department of Trade of the Ministry of Agriculture, Industry and Trade, and Sweden maintains the Royal Swedish Academy of Engineering Science, which receives financial aid from the government.[78]

The British with their characteristic thoroughness have organized a great competitive and centralized research plan for industries, the basic purpose of which is to advance the industrial interests of Great Britain in foreign trade. The government has created an Imperial Trust for the Encouragement of Scientific and Industrial Research, amounting to one million pounds.[79] This fund has been spent during the past few years largely through grants in aid of research undertaken by voluntary associations formed for such purpose. This contribution to the assured income of such associations furnished through subscriptions of their own members varies in amount according to circumstances with a normal maximum of pound for pound. Subscriptions paid by members are recognized by the government as business costs, not subject to income or excess-profits

[77] For a complete statement of the organization and purpose of this Council, see address "The Organization of Research," by James Rowland Angell, Chairman, National Research Council, *Journal of Proceedings and Addresses*, of the Assn. of American Universities, Twenty-first Annual Conference, Nov. 7-8, 1919, p. 39.

[78] *Report* of the Privy Council for Scientific and Industrial Research, 1920-21, pp. 104-106.

[79] *Report* of Committee of the Privy Council for Scientific and Industrial Research, 1916-17, p. 49.

taxes. It is expected that after the work has been well started, the larger industries will not need governmental assistance. At the end of 1921, there were twenty-four active research associations in Great Britain and others in process of formation.[80] These associations are most carefully organized to protect the interests of the British trade against foreign competition, to protect the rights of the individual members and to correlate governmental, scientific and industrial efforts in research. The responsibility for the prosecution of the work is placed on the industries themselves, to avoid chaining the efforts of the industries to government routine. The Report of the Committee of the Privy Council for Scientific and Industrial Research for 1917 outlines the benefits accruing to the members of such organizations in the following language:—

"It is anticipated that each firm subscribing to a research organisation will have the following privileges:

(1) It will receive a regular service of summarised technical information which will keep it abreast of the technical developments in the industry at home and abroad. To do as much for itself any firm would have to employ more than one man on its staff reading and translating the technical press.

(2) It will be able to obtain a translated copy of any foreign article in which it may be specially interested and to which its attention will have been drawn by the periodical bulletin.

[80] *Report* of Committee of the Privy Council for Scientific and Industrial Research, 1920-21, p. 106. These associations were the British Shoe & Allied Trades Research Assn., British Cotton Industry Research Assn., British Sugar Research Assn., British Iron Mfrs'. Research Assn., Research Assn. of British Motor & Allied Mfrs., British Photographic Research Assn., British Portland Cement Research Assn., British Research Assn. for the Woollen & Worsted Industries, British Scientific Instrument Research Assn., Research Assn. of British Rubber & Tyre Mfrs., Linen Industry Research Assn., Glass Research Assn., British Assn. of Research for Cocoa, Chocolate, Sugar, Confectionery & Jam Trades, British Non-Ferrous Metals' Research Assn., British Refractories' Research Assn., Scottish Shale Oil Scientific & Industrial Research Assn., British Leather Trades' Research Assn., British Launderers' Research Assn., British Electrical and Allied Industries' Research Assn., British Silk Research Assn., British Motorcycle and Cycle Car Assn., British Cutlery Research Assn., British Music Industries' Research Assn. and British Cast Iron Research Assn.

(3) It will have the right to put technical questions and to have them answered as fully as possible within the scope of the research organisation and its allied associations.

(4) It will have the right to recommend specific subjects for research, and if the Committee or Board of the research organisation of that industry consider the recommendation of sufficient general interest and importance, the research will be carried out without further cost to the firm making the recommendation, and the results will be available to all the firms in the organisation.

(5) It will have the right to the use of any patents or secret processes resulting from all researches undertaken either without payment for licenses, or at any rate on only nominal payment as compared with firms outside the organisation.

(6) It will have the right to ask for a specific piece of research to be undertaken for its sole benefit at cost price, and, if the governing Committee or Board approve, the research will be undertaken." p. 50.

The annual reports of these associations show them to be engaged in a constantly widening range of research of a fundamental character as well as that of immediate practical value.[81]

Conclusion.—Unquestionably the systematic well-financed research work of great industries, correlated through an advisory body of the leaders of business and science, such as is being developed in England, can become a powerful factor in improving processes, reducing cost and increasing the efficiency of such industries in world competition. It is impossible, within the scope of this chapter, to more than sketch the possibilities of research as a fixed trade association activity. To competitive industries striving for commercial supremacy, it is vital. The industry which breaks through the limitations of the past and improves its products, reduces its cost, and opens new avenues of demand must outstrip its more lazy competitor which, by reason of lack of organization or inertia of spirit, is satisfied with the status quo. There will be no end to progress. To

[81] See, for example, "Report of Council," British Research Assn. for the Woollen & Worsted Industry, 1921, published March 22, 1922; *Second Annual Report*, of the British Non-Ferrous Metals' Research Assn., published January, 1922; "Report of the Council," Linen Industry Research Assn., 1921, published March 21, 1922.

the smaller units in any industry, competitive research offers possibilities of increased efficiency and greater profits. To industry in general it affords opportunity for decreased cost, increased output and more stabilized conditions of manufacture and sale. To the public it holds promise of reduced prices, better quality, enlarged utility of products and constant progress. In such an activity there is no hint of violation of the law. Surely no one will deny that here is one of the activities in which broad-visioned business men may jointly engage and render great service, not only to themselves but also to industry and to the public. Would it not be possible to develop in this country, through the Department of Commerce, which is already admirably equipped for such work, a great central agency of voluntary coöperation in research work which would work with an Advisory Council of the leaders of business, science and of labor, and keep intimately in touch with the scientific and industrial development the world over. Such an organization could give impetus and direction to the development of American industry and increase the prosperity of the nation.

CHAPTER VIII

TRADE ASSOCIATIONS AND LABOR

The importance to our social and economic life of a rapprochement between capital and labor is apparent to everyone. The development of our great business organizations with thousands of employees has destroyed the personal contact between employer and worker. Huge impersonal industrial machines to which labor is merely a commodity do not promote goodwill among their employees. The growing antagonism of labor toward capital and its steady trend toward radicalism is a matter of general concern. No amount of legislation can correct the situation. There must be means provided for the restoration of friendly personal relations between employer and employee. Laws may restrain abuses arising from warfare between capital and labor, but the leaders of business and the leaders of labor approaching the problem in broad-visioned and public-spirited fashion must themselves work out the real solution. Surely the magnitude of such a problem touching the foundations of government and menacing the future warrants organized consideration by the business men of every industry. The trade association affords the medium for the concentration of the thought and the experience of business men from which there ought to spring new plans and new leadership working for the maintenance of fair and just relationships which will protect public as well as private interests.

Unfortunately, there has been, comparatively speaking, little consideration of labor questions by trade associations except in those branches where labor is so important a factor in costs that it compels attention. Possibly, also there is a feeling that the dealing with labor as a national unit is dangerous. There is, of course, no activity in which an association may engage which can more quickly wreck it. The United Typothetæ of America seem to have happily solved this problem by creating two divisions within the association, called the Open Shop Division

and the Closed Shop Division, which are completely autonomous in themselves, with a coördinating committee known as the Industrial Relations Committee, to act as an advisory body.[1] This organization deals with the highly controversial questions involving labor policies, in order that the general program of the association in other matters may not be harmfully affected.

Most business men have intense feelings on the labor question as it affects their industry, and too often a failure to maintain their viewpoint results in their withdrawal from the association. But on the other hand some associations have found that most of their disputes are simply matters of misunderstanding which are quickly overcome if both groups take the time to meet and discuss the dispute in a coöperative spirit.[2] In every association there will be found three groups of business men. The first are bitterly opposed to organized labor and are determined to do all within their power to destroy it. The second, more conservative and cautious, view the problem from a purely business standpoint, dealing with labor to secure the best bargain possible. The third group are searching constantly for new methods, new plans, and endeavoring to evolve a system which will make for industrial peace. In every association a relatively few men dominate its councils, and the character of these men as well as the character of the leaders of labor will determine the attitude of the organization of the industry toward labor. Most trade associations because of their fear of disruption of their association and the desire of their members to have complete freedom of action exclude discussion of, and organized effort in labor matters. Other associations are powerfully organized to combat union labor. Others have evolved elaborate machinery for dealing with labor on a business bargaining basis. Others utilize their organization merely as a forum for the interchange of ideas with the hope that the exchange of experiences may be productive of better conditions.

Associations Opposed to Organized Labor.—A typical example of the organizations whose fixed policy appears to be

[1] "Standardization and Coöperation in the Printing Industry," F. A. Silcox, *Proceedings*, Academy of Political Science, vol. 9, No. 4, Jan., 1922.

[2] "Report," E. C. Miller, President, American Photo-Engravers' Assn., *Photo-Engravers' Bulletin*, July, 1918, p. 8.

opposition to union labor is the National Founders' Association. This association has thoroughly protected the interest of its members by the maintenance of an effective strike-breaking organization, an espionage system and similar activities. Its policy is largely a defensive policy against what it believes to be the unjust demands of labor. It stands vigorously for the open shop, although a member is not bound to maintain open shop conditions in his plant.[3] The National Metal Trades' Association, the National Erectors' Association, and the National Association of Manufacturers to a certain degree take the same position. Some of these organizations have adopted their present attitude as a result of what they feel to be unsatisfactory experience in collective bargaining with labor organizations.

The Study of Labor Problems.—While it may be better from the standpoint of permanency of the association for most associations to avoid direct dealings with labor organizations, there is no doubt that there is a great field for coöperative study of labor problems affecting each industry. There ought to be a forum where the best minds of the industry can meet for the discussion of new plans and new methods of handling labor as they are evolved by the individual manufacturers. It will not wreck an association merely to use the organization as a medium through which the experience of the individual members or of leaders in other industries may be made available to increase the fund of knowledge of all members. There are various ways in which associations can and have been of value in bettering the relationships between capital and labor.

Discussion at Association Meetings.—The first is merely by utilizing the association meetings and bulletins for a thorough discussion of labor problems. New plans for more friendly relations between the manufacturer and his employees can be explained and subjected to the searching criticism of other manufacturers. Ideas of practical value are thus constantly made available for the entire membership. This is the method employed by the Associated General Contractors of the United States, the American Drug Manufacturers' Association, the National Association of Sheet Metal Contractors, the National As-

[3] For a history and description of this organization, see the *Quarterly Journal of Economics*, vol. XXX, February, 1916.

sociation of Cotton Manufacturers, the National Association of Builders' Exchanges, the National Electrical Contractors' Association, the American Concrete Pipe Association, the American Foundrymen's Association, the National Paper Box Manufacturers' Association, the Refractories Manufacturers' Association, and the American Mining Congress. Without committing the association to any fixed policy, a common fund of experience of great value is placed at the service of every manufacturer in determining his individual labor policy.

Formulation of Principles.—A second method which is but an extension of the first is the formulation of the experiences of the members into working principles for the benefit of the membership. The Associated General Contractors of America have adopted what is called the Constitution of Industrial Relations, outlining the general principles which the association believes to be applicable, which are backed up by a so-called "Statute of Employment Relations" specifically applied to the construction industry.[4] This latter document reads as follows:

A STATUTE OF EMPLOYMENT RELATIONS

APPLIED TO THE CONSTRUCTION INDUSTRY

I.—Employment

(1) The value of a good spirit in an organization is vital to successful industry. The organization may think favorably or unfavorably of its employers, may work with enthusiasm or without any, depending upon what the individual thinks of his employers and the work they are doing. Therefore, there must be frankness between employer and employee, perfect freedom in action and expression of thought, to maintain mutual friendly relations.

(2) When hiring an employee, a complete record of his experience should be obtained. He should be fully informed of the conditions of his employment, wages, hours, location, living conditions, dangers, etc., and the methods of his employer and what he expects of his employee. That is, there should be frankness, mutual confidence, and respect on both sides from the start. Continuous efforts must be made to advance and increase these mutual relations in order to prevent or adjust misunderstandings as soon as they are discovered.

(3) The fact is recognized that in many locations and establishments,

[4] *Bulletin*, of Associated General Contractors, Feb., 1921, pp. 29, 31.

the basic eight-hour day, or a weekly equivalent, has been adopted as the usual standard. As the number of hours properly constituting a day's work varies in some locations and classes of construction work, it is recommended that changes from the usual standard be so made as not to disrupt or disorganize the rest of the industry.

(4) Overtime work should be discouraged. Where the nature of the work is such as to require employees to work beyond the established hours, they should receive an extra rate of compensation for such overtime.

(5) Continuity of employment is desirable and should be maintained as far as possible.

(6) Apprentices should not be limited in number in any trade. If equitable rules as to the period of service and the degree of skill required of apprentices are made by the various trades, the law of supply and demand will regulate the number.

(7) Discrimination against the use of apprentices by organized labor must not be permitted. Employers in large communities should encourage the establishment of public trade schools and the attendance of the youth at them.

II.—Working Conditions

(1) The public interest and the comfort and health of individual employees demand that every effort should be made to perfect the conditions of employment, with special reference to sanitary conditions, heat, light, ventilation; safeguarding the health of workers and providing protection against, and treatment in case of accidents; suitable rest periods where necessary; and due warning to the worker if he is undertaking to perform a hazardous operation.

(2) Provide safety devices and guards against accident and disease. Mechanical plants, stagings, ways and works should be inspected daily. Where temporary camps are used, provide proper inspection for sanitation, food supply, water, and the welfare of the men.

(3) Employees should be safeguarded against unjust treatment or arbitrary discharge by their foremen or immediate superiors. In justice to employees, adequate advance notice should be given, whenever possible, to those who must necessarily be laid off. Likewise, an employee should give reasonable notice to his employer of his intention to leave the service.

(4) The temperament of the gang boss or foreman in direct contact with the hand workers is most important. He must be fair and give his men a square deal.

(5) Establish by conference between the parties, what facts concerning the company's and men's activities should be common knowledge to both, and provide for giving these facts fullest publicity.

(6) All States should enact compulsory workmen's compensation insurance laws that are just both to the employer and employed.

III.—Production

(1) Public interest requires increasing output per man as a prime factor in reducing construction costs.

(2) Employees should not, therefore, intentionally restrict individual output to create an artificial scarcity of labor as a means of increasing wages or continuity of employment, or of equalizing the productivity and wages of workers having different degrees of skill and ability. Employees should also coöperate with the employer in the adoption of new and improved machinery and methods with a view to increasing efficiency, thereby lowering the cost of construction.

(3) The value of industrial training as a means of increasing production is recognized. Such training should be encouraged by employers and employees.

(4) The reduction in working hours below the economic limit in order to secure greater leisure for the individual should be made only with full understanding and acceptance of the fact that it involves a commensurate loss in the earning power of the workers, a limitation and a shortage of the output of the industry, and an increase in the cost of construction, with all the necessary effect of these things upon the interests of the community and the nation.

(5) As an incentive to greater production, make provision for increasing compensation whereby men of extra skill and knowledge may add to their regular wage.

(6) Make some expression of appreciation, by word or letter as reward for duty well done.

(7) Make an incentive to extra effort for production by promotion where possible for those who prove worthy.

IV.—Right of Association

(1) The association in groups of employees not affiliated with an organization of non-employees should be encouraged. The right of employees to organize into trade unions is recognized.

(2) Employees should not require of their employer that employment be conditioned on membership or non-membership in a trades or labor union. Employees should not coerce fellow-employees to join, or refrain from joining, a trades or labor union.

(3) Freedom of contract of employment must never be impaired. However, employers should not so exercise this right as to discriminate in the employment or discharge of employees on the ground that they are, or are not, members of a trades or labor union.

(4) Means should be devised to create public sentiment in favor of these principles and to keep the community informed of all action at variance to them.

(5) Capital, employers and employees should be subject to law and its

processes with equal facility. Special legislation which may benefit either to the possible injury of the other, or to the possible injury of the consumer, is detrimental—and a consequent menace to the community.

V.—Adjustments of Disputes

(1) Adequate means, satisfactory to both employer and employee, and voluntarily agreed to by them, should be provided for mutual discussion and adjustment of employment relations.

(2) Where the channel of communication existing between an employer and the individual employee does not offer employees suitable means of negotiation with their employer, the employer should seek to establish mutually satisfactory means. For this purpose representative negotiation is advocated.

(3) Representative negotiation is defined as that form of collective bargaining which provides for negotiation between an employer and duly accredited representatives of his employees, regarding hours, wages, and all other matters properly affecting their relationship. Employees' representatives should be duly accredited, should be chosen by the employees, from among their own number unless otherwise agreed by employer and employees, and be empowered by the employees to negotiate for them. Such negotiation should be under control of the parties immediately concerned and should they fail to reach an agreement, the employer and the group of employees' representatives should each have the option of choosing, without restriction by the other party, a reputable and competent advisor or advocate to meet with them in the continued negotiations. Representatives of employees, selected by and from among their own number, should be assured by their employer that no discrimination will be made against them because of anything said or done in their representative capacity.

(4) As it is often impractical, owing to the nature of the industry, for a single employer to reach a final conclusion with his own employees, a group of employers should negotiate with a group of employees. Such group negotiations should be conducted as far as possible in accordance with the plan of representative negotiations above outlined.

(5) Nothing herein is intended to abrogate the right of an individual employee to negotiate directly with his employer.

(6) Employers and employees should uphold in their integrity all arbitration awards or agreements entered into between them.

(7) While the employer and employee may reach a settlement of their individual relations without reference to outside aid, this solution may affect the rest of the industry, locally, as well as the interest of the public, which is paramount. Therefore, the public's representatives ought to have a right of review of a settlement to ensure that its interests are protected. The interests of the public in reviewing adjustments of industrial relations can be well performed by the establishment of Industrial Courts.

(8) There must be no coercion by either party toward the other. Public sentiment should support all public officials in enforcing the laws in respect of these practices.

(9) The fact should be recognized that both employer and employee are servants of the public, that every disagreement adds to the cost of living and that the final judge in all disputes should be the public. The public should give expression to its views through a board of advisers whose decision should be recognized by both parties as final. Disputes, ill feeling, and discord invariably fade, once the facts are aired and given to the public."

Similar action in every industry in formulating basic principles of relationship and procedure with labor, even though far from perfect crystallizes and directs sentiment along constructive channels.

Association Action on Labor Problems.—A third form of labor activity is direct active participation in activities designed to improve labor conditions and industrial relations, but not necessarily involving controversies with labor organizations.

Accident Prevention.—A number of associations are giving considerable attention to safety and accident prevention work. Among these may be mentioned the Southern Pine Association, the Associated General Contractors of America and the National Association of Manufacturers. The Southern Pine Association has held frequent conferences with managers and superintendents, has conducted many meetings with employees, and has published a number of bulletins instructing employees and employers as to causes of accidents and their avoidance. This work has resulted in a reduction in the number of more serious classes of accidents. Some associations have been coöperating with the National Safety Council in this work. Aside from the desirability of protecting employers, employees and the community against the burdens imposed by avoidable accidents, it is recognized that humanitarian considerations as well as the tendency of such work to discourage radical movements among working men make it of great value to industry.[5] A real program of accident prevention in industries where labor cost is a considerable portion of the total costs reduces costs, decreases

[5] *Fourth Annual Proceeding,* Southern Pine Assn., 1919, p. 41.

labor turnover, increases the morale of employees, and builds goodwill between employer and employee.[6]

Trade Education.—The education of the present and future labor supply may be desirable to maintain the efficiency of production. An organization has been projected in England known as the National Alliance of Employers and Employees, which is working out a great program of economic education.[7] A special educational committee with one-half of its personnel employers and the other half trade unionists is working in coöperation with the educational authorities to develop textbooks without bias which it is hoped will aid materially in promoting industrial peace. In America educational work so far as trade associations are concerned has been more directly utilitarian. Its purpose has been to educate the worker in his trade, either as a means of enlarging or increasing the efficiency of the labor supply or of freeing industry from what are felt to be the undue restrictions of the unions. The United Typothetæ of America is developing a program of apprenticeship training in the printing industry because of the appalling shortage of apprentices. Investigation by the association disclosed that printers generally do not average much over fifty per cent of the numbers of apprentices permitted under the union rules.[8] The National Metal Trades Association has made a survey of various methods of industrial education through apprenticeships, trade schools, foreman instruction, special plant training, and vestibule schools, in an effort to widen the interests of its members in trade education.[9] Other associations have actively coöperated with the school authorities in the larger cities, and have brought about the establishment of special trade schools. The Labor Committee of the National Association of Sheet Metal Contractors has studied and approved the courses of certain correspondence schools, and has worked successfully with local

[6] Davis S. Beyer, *Bulletin,* of the Associated General Contractors, February, 1921, p. 58.

[7] "Economic Facts for Young Trade Unionists," Harry Dubery, *Bulletin,* of the Federation of British Industries, Dec. 13, 1921, p. 728.

[8] "Report," H. P. Porter, Chairman, Committee on Education, *Proceedings,* Convention United Typothetæ of America, 1919.

[9] *Open Shop Review,* June, 1919, p. 213.

associations for the establishment of courses of study in the day and night schools.[10]

The Sheet Metal Employers of Brooklyn for some time have partly financed a course in sheet metal work at Pratt Institute, and similar courses are being given in several trade schools in New York City.[11]

The United Typothetæ of America has for seventeen years maintained a school of printing.[12] This school has equipment valued at $100,000, and a large number of its graduates hold positions of responsibility in the industry. Its work is under the direction of the association. Tuition charges are made at approximate cost. The Canadian building construction industries have proposed the creation of a National Apprentice Council, consisting of one employer in each branch of the building trade, one journeyman for each branch, two architects, and two industrial engineers whose duties would be to set up local councils similarly organized, who would apply to their localities a uniform system of indenture and education.[13]

The National Federation of Construction Industries is gathering information as to plans and systems of apprenticeships from every possible source, with a view to working out a constructive plan of action in this country.[14] Building construction courses were started in the College of the City of New York four years ago, the plan being to establish some twenty courses which would offer practical training to any grade of men connected in any way with building construction. In the building trades recently, even with the unemployment prevailing throughout the country, there was a shortage of certain classes of labor. This association stresses the importance of educational work of this character in the following language:

[10] *Proceedings*, 1915, pp. 17, 18.

[11] *Sheet Metal Journal*, July, 1917, p. 35.

[12] *Typothetæ Bulletin*, August, 1918, p. 23.

[13] Report, L. C. Wason, Chairman Committee on Labor, Associated General Contractors of the United States; *The Constructor*, June, 1922, p. 42; the labor committee of this association is doing exceptionally meritorious work in the study of labor problems and in focusing the attention of association members on these questions.

[14] *Bulletin*, Feb. 25, 1922.

"It is the responsibility of management to attract and to properly train a sufficient number of young men in the building trades, if we are to achieve the potentiality of latent and undeveloped markets for the construction industries in the years to come." [15]

There would appear to be an almost endless field for work of this character among trade associations. There is certainly a great opportunity for the reasonable coördination of our industries with our educational system. Coöperation with educational authorities would make our system of education more responsive to the needs of industry and of untold benefit in increasing the earning power of thousands of boys and girls whose education must by force of economic conditions be limited.

Settlement of Jurisdictional Strikes.—Again, some associations have been able to aid labor organizations themselves in the elimination of disputes which result in loss of time and economic waste. The Associated General Contractors of America has helped to reduce the waste resulting from strikes in the construction industries in a very effective manner. Almost eighty per cent of the strikes in building operations have been jurisdictional strikes, *i.e.*, strikes arising from disputes between unions as to which trade is entitled to do the work.[16]

A national board for jurisdictional awards has been created to adjudicate the rights of the several trades to a particular class of work in case of dispute.[17] The personnel of this board consists of one representative from the American Institute of Architects, one from the Engineering Council, two from the Associated General Contractors of America, one from the National Association of the Building Trades, and three from the Building Trades Department of the American Federation of Labor. This board, operating under a constitution and clearly defined rules of procedure has rendered a number of decisions which have improved working conditions in the industry.

Unemployment.—Associations with mixed motives of benefit to themselves and to labor can make studies of unemployment and its causes. The Associated Contractors of America have

[15] *Bulletin,* Feb. 25, 1922.

[16] *Bulletin,* of the Associated General Contractors, February, 1921, p. 4.

[17] *Ibid.,* p. 35.

made a study of unemployment in our various cities, and are endeavoring to bring about an increase in fall letting of contracts to lessen the seasonal character of their building.[18] The same association has made a thorough investigation of wages and living costs in our various cities which has had unexpected results in some instances in lessening the demands of employers for the reduction of wages.

Other Activities.—The foregoing are typical of activities in which associations may safely engage. There would appear to be no good reason why the association could not be utilized as a medium for the study of every phase of the labor question. The results of welfare work, the effect of lighting conditions and sanitary conditions on working efficiency, living conditions in an industry, the cost of living, the effect of shorter hours on production, the shop council systems, the effect of restrictive union regulations and many other problems could be studied in a practical business manner. The United Typothetæ of America through their Department of Industrial Relations are making comprehensive statistical studies of the labor supply, wage trends, and cost of living. The experience of every member could be made available to all the members and submitted to their criticism and analysis. If the trade associations of the country would make such matters a fixed part of their activities for serious study and discussion at meetings and by committees composed of members who take a deep interest in such problems, there can be little doubt that there would be a substantial improvement in the relationships of capital and labor.

Collective Bargaining Between Associations and Labor.—The more intensive organization of society tends inevitably toward group action. Business, farm, labor and many other interests have within the past ten years developed organizations of amazing size and power. The laboring man always living close to the margin of subsistence probably has a greater need for organization than any other social group. The practical impossibility of securing uniform labor legislation because of the fact that manufacture, as such, is not within the control of the

[18] *The Constructor*, March, 1922, p. 53.

federal government, makes organization the only method by which the working man can hope to secure anything approaching uniformity of standards of living. It is wholly beyond the power of well-intentioned manufacturers to control the labor methods of their competitors. If labor is not organized to prevent such concerns from maintaining low standards in their plants, the force of their competition will compel the adoption of such standards generally. Inexorable economic conditions compel the widespread organization of labor and it is futile to hope that labor will revert to the disorganization of earlier days. While concerted movements of employers may change the form of organization or result in temporary disorganization, it is inevitable that the labor of the future will be organized labor, more effective and powerful than it is to-day just as business, itself is steadily becoming better organized as a group. The existence of the group system in industry will compel the evolution of procedure and machinery for negotiation and contact between such groups.

As the labor movement strengthens, collective bargaining will become more common. Regardless of broken agreements, regardless of abuses, collective bargaining represents the orderly method, the businesslike method under which labor and capital on the basis of equality of position may fix the terms of their relationships. There are practical advantages both to business and to labor in joint dealings of this character of which the limits of this chapter will not permit discussion.[19] Regardless of its merits or demerits, collective bargaining by written contract between responsible parties is the businesslike way of fixing relations. While attempts to reduce the size of the labor units with which such contracts are made, through the organization of shop committees or similar devices may be temporarily successful, the ultimate result will be a federation or unification of such committees into a national or regional organization. Workingmen will quickly be taught that there is a tendency for

[19] For an able discussion of the value of collective bargaining, see TEAD AND METCALF, "Personnel Administration," Chaps. XXXI, XXXII, McGraw-Hill Book Co.

the wage scale and conditions of employment to fall to the level of the lowest existing in the industry,[20] a tendency which only widespread organization can offset.

In industries where labor represents a substantial portion of the cost of production, and the employees have a national organization, it is now often necessary for the entire industry to act as a unit in bargaining with the union as to wages and conditions of employment. Sometimes too, the industry is localized as to its production so that the evils which may flow from national agreements are unavoidable. The Associated Leather Goods Manufacturers has negotiated agreements with the union covering hours, overtime, piece work, outside shops, sanitary conditions, and the like, which also provide machinery for the arbitration of all complaints and disputes.[21] The Granite Manufacturers' Association for thirty years negotiated trade agreements with the unions in the industry covering hours of labor, wages, and conditions of employment.[22] This Association recently, however, because of inability to bring about a reduction in wages is endeavoring to work under the so-called "American" plan, providing also machinery whereby any worker may apply to the Association if he fails to secure justice from his employer.[23] The International Monumental Granite Producers' Association has also dealt directly with the labor organizations.[24]

The newspaper publishers since 1899 have entered into arbitration agreements with the unions for the arbitration of disputes regarding wages, hours and working conditions, and the machinery thus manufactured has prevented hasty action and insured reasonable consideration of issues as they arise.[25]

[20] W. L. Mackenzie King, "Industry and Humanity," p. 67.

[21] "Memorandum of Agreement between Associated Leather Goods Manufacturers of the United States, and the Fancy Leather Workers' Union," Aug. 30, 1921.

[22] See "Handy Reference Book: Agreements and Indentures," 1915-1920, Granite Mfrs'. Assn.

[23] Letter, Athol R. Bell, Secretary, Granite Mfrs'. Assn., May 4, 1922.

[24] See Agreement between International Monumental Granite Producers' Assn. and Granite Cutters' International Assn. of America, Feb. 27, 1919.

[25] L. B. Palmer, Secretary, American Newspapers Publishers' Assn., *Publishers' Guide*, May, 1912, p. 37.

The West Coast Lumbermen's Association deals directly with its employees through a joint board of twelve employers and twelve employees.[26]

The Closed Shop Division of the United Typothetæ of America, when authorized by its local divisions, deals directly with the three great unions of the industry.[27] The effective organization of employers and employees in every industry has possibilities of very substantial benefits. Indeed practical students of the labor problem take the position that "the maximum degree of nationwide organization on the part of employers and workers is indispensable to a scientific and sound industrial future."[28] The value of complete organization has been stated in the Garton Foundation Memorandum in the following language:—

"Yet the possibilities of combined action which lie in these two great groups of highly organized and powerful bodies might transform the whole face of industrial life. Their united knowledge of both sides of the industrial process should enable them to throw light on every phase of its successive developments. Their united strength would render them, in combination, practically irresistible. But to secure the realization of these possibilities the coöperation between the two groups must be continuous and constructive, and must be based upon a recognition of the common interests of employers and employed, both as parties to industry and members of the community. Employers must realize that both their own interests and the obligations of citizenship impose upon them the necessity of sympathetic understanding of the lives and standpoint of those with whom they work and a willingness to coöperate, without dictation or patronage, in every endeavour to improve their material or social conditions. Labor must realize its direct interest in the improvement of industrial processes, the organization of industry, the standard and quantity of production, and the elimination of waste in material or effort. Both the Employers' Association and Trade Unions must learn to regard them-

[26] "National Trade Associations," A Study by National Assn. of Manufacturers, 1922, p. 166.

[27] "Standardization and Coöperation in the Printing Industry," F. A. Silcox, *Proceedings*, American Academy of Political Science, vol. 9, No. 4, January, 1922.

[28] Tead and Metcalf, "Personnel Administration," p. 488.

selves as joint trustees of one of the most important elements of national life." [29]

More effective organization of both employers and labor can be of great public benefit just as it can, if improperly directed, be capable of the most serious public injury.

Industrial Councils.—As a result of urgent war needs, the British government early in the war recommended the formation by associations of employers and employees in the various industries of Joint Standing Industrial Councils, consisting of representatives of each group. This idea has spread gradually until there are now councils in over fifty industries in which there are included over three million workers.[30] These organizations are permanent institutions, based upon the principle of equal representation. They do not limit their deliberation to questions of wages and working conditions but consider also general problems affecting the future of an industry such as research, the introduction of improvements, proposed legislation and so on.[31] There has been manifested recently a tendency to introduce in this country somewhat similar organizations for the joint consideration of industrial problems. In 1919, there was formed in the printing industry an International Joint Conference Council consisting of the following constituent bodies:—

Closed Shop Division, United Typothetæ of America,
Printers' League of America,
International Association of Electrotypers,
American Association of Photo-Engravers,

which are employers' organizations, and

The International Typographical Union,
The International Printing Pressmen and Assistants' Union,
The International Brotherhood of Bookbinders, and
The International Stereotypers' and Electrotypers' Union.[32]

[29] Garton Foundation Memorandum, "The Industrial Situation after the War," reprint by U. S. Shipping Board.

[30] Tead and Metcalf, "Personnel Administration," Chap. XXXIV discusses the history, organization and methods of these councils.

[31] *Ibid.*, pp. 495, 496.

[32] "Standardization and Coöperation in the Printing Industry," F. A. Silcox, *Proceedings*, American Academy of Political Science, vol. 9, No. 4, January, 1922.

The constitution of this organization states its purposes in the following language:

I. PREAMBLE

"Only through joint conferences in the spirit of mutual helpfulness between employees and employers can the foundation be laid for stable and prosperous conditions within the printing industry. To promote the spirit of coöperation and to deal with the problems of the industry in a way to insure the protection of the interests of all concerned, the establishment of an International Joint Conference Council, made up of representatives of employers and employees, which shall be thoroughly informed as to conditions and interests of all parties in the industry and in a position to suggest for ratification regulations which shall eventually become the law of the industry, is considered essential.

"Compulsory arbitration by law is deemed impracticable as a means of adjusting controversies between employers and employees. Controversies between employers and employees can and should be adjusted through voluntary agreements to refer disputes to boards of conciliation and arbitration composed of representatives of employers and employees in the industry affected. It is in this spirit of arbitration and conciliation that the organization and operation of an International Joint Conference Council for the Printing Industry and Allied Trades is undertaken."

III. SCOPE OF ACTIVITIES

"The International Council is to devote its activities not primarily to disputes, to the fixation of wage scales, the making of specific wage agreements and the like, but to matters of policy.

"Among the activities which might come within the scope of the International Council are the following:

(a) Outlining of general trade policies which will secure the greatest degree of coöperation between employer and employee, and at the same time insure full protection of the interests of the public.

(b) Considering, reporting and advising on any legislation, affecting the trade.

(c) Studying and proposing methods for securing uniform hours and shop practices.

(d) Coöperation with those departments of the Government exercising jurisdiction, to maintain such selling prices as will insure a reasonable remuneration to both employers and employees.

(e) Consideration and review of the causes of any disputes which arise in the industry. All conciliation and arbitration processes covered in existing agreements must be exhausted before appeals are taken to the International Council. Where no arbitration or trade agreements are in

effect, appeals may be taken through regular and recognized channels to the International Council.

(f) Investigation of the question of apprenticeship conditions; adoption of suitable methods of selection for apprenticeship, and the technical training of apprentices, learners and journeymen throughout the industry; the improvement of process, designs and standards of workmanship; to seek adequate representation on the control and management of all technical institutes; to consider and report upon all improvements of processes, machinery and organization, and appropriate questions relating to management and the examination of industrial experiments, with special reference to coöperation in carrying new ideas into effect, and full consideration of the employees' point of view in relation thereto. The better utilization of the practical knowledge and experience of employees, with provision for facilities for the full consideration and utilization of acceptable inventions and improvements designed by employers or employees, and for the adequate safeguarding of the right of the designer of such improvements.

(g) Determination of practicability of establishing wage adjustment boards throughout the industry.

(h) Consideration of any matters of general interest to the Trade, whether industrial, educational, economic, legislative or hygienic, may be taken up."

While the organization has been in existence but a few years, F. A. Silcox, Director of the Department of Industrial Relations of the United Typothetæ, in the article above referred to outlines the following as its achievements:—

"1. The establishment of machinery for informal and frank discussion of problems in which both groups are vitally interested and the maintenance of an industrial good will and respect for one another's opinions which will lay the foundation for materially better industrial relations throughout the industry.

2. Adoption of cardinal principles to guide wage negotiations on the basis of joint investigation and recognition of the facts as to economic conditions in the industry.

3. Provisions looking toward the constructive handling of the apprenticeship problem—such as a standard percentage ratio which apprentices' wages should bear to those of journeymen for each year of apprenticeship; the establishment locally of joint apprenticeship committees authorized to enforce apprenticeship contract regulations; methods of making surveys to determine number of apprentices needed and the like.

4. A standard International Arbitration Agreement form recommended for all contractual negotiations.

5. The agreement through mutual legislative negotiations for the introduction on May 1, 1921, of the 44-hour week, in the union-employing sections of the industry.

6. Standard Cost of Living Readjustment Clause, recommended for local contracts.

7. Establishing joint committees to consider shop practices and the possibilities of greater standardization."

By far the most important effort to correlate the efforts of all factors in industry, including labor, to secure higher standards of integrity and efficiency is the program for the organization of the American Construction Council. Over two hundred trade associations producing materials for, or engaged in the construction industries have been invited to participate. Architects, engineers, contractors, material and equipment manufacturers and dealers, bond, insurance, and real estate interests, the construction departments of federal, state, and municipal governments, and public utilities are all expected to unite in this movement. The building trades department of the American Federation of Labor has been asked to become a member. A number of large associations are actively participating in the preliminary work of organization. The former Assistant Secretary of the Navy, Franklin D. Roosevelt, has been asked to accept the Presidency of the Council. The Council promises to be a great "town meeting" of the construction industries. The purposes of the Council has been stated by its organizers in the following language:—

"The formation of a code of ethics acceptable to the industry and to the public:

"The gathering of adequate statistics so that the industry may operate intelligently. While there are partial statistics collected by many sources, they have not been brought together and interpreted in the light of all the facts:

"A reduction of the national shortage of building mechanics and the establishment of the necessary apprenticeship system:

"A national study of building codes and the working out of a program for carrying the recommendations into effect:

"A revision of the existing freight rates on construction materials:

"A stabilization of the Construction Industry to mitigate the evils of seasonal employment and the trade migration of labor:

"The encouragement of local building shows and the adoption of a publicity program capable of giving the public an adequate conception of the magnitude and work of the Construction Industry."

The formation of this Council represents a great organized effort to apply the conference method, the method of common counsel in the betterment of conditions in the industry with due regard to the protection of the interests of the public. One of the most significant features of the Council, adopted after mature consideration by the leading business men of a number of industries, is the participation of the labor organizations in the Council for the consideration of the great common problems of the industry.

If our industrial councils give due consideration to the public interests, if they are organized and conducted in good faith, if they do not attempt to arbitrate or participate directly in controversies but are maintained as an agency for common counsel where representatives of capital, labor, and the public can meet for the development of constructive programs upon which there is a possibility of agreement, they ought to become great forces for progress in industry. Any plan worked out in conference is bound to get much farther than a plan forced by some factor of an industry upon another simply because that faction thinks it is strong enough to dominate the situation. The mere opportunity for joint conferences and joint considerations of pressing problems by producers of raw material, manufacturers, distributors, laborers and professional men can not fail to result in far greater progress than the present method of letting such problems take care of themselves. There ought to develop from such organizations practical plans for the stabilization of employment, for the trade education of the worker, for the joint accurate determination of facts as to living costs and the like, disputes concerning which often prevent a reasonable settlement of disputes. If such councils are conducted in a fair democratic manner they ought to reduce industrial disputes, lessen waste, stabilize industrial conditions and further the best interests of the public. The creation of such councils in American industry, to quote the language of the sponsors of the American Construction Council, would seem to be the "logical step in the evolution of our industrial system."

The legality of constructive efforts in labor matters will not be challenged.[33]

[33] See letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922. Appendix J.

CHAPTER IX

COÖPERATIVE ADVERTISING

HUGE sums are spent annually for advertising in the United States. This science of organized mass salesmanship so rapidly growing in dignity and importance has become one of the great forces in American industry. The development of the factory, with its resulting division of labor and increasing use of machinery has tremendously enlarged the productive capacity of our industries and the volume of commodities produced has decreased prices as well as standardized values during the past half century.[1] Standards of living have immeasurably improved as a result. The great improvements in methods of communication and transportation and the relinquishment of many of the tasks of the home to the factory have also greatly enlarged markets and increased competition. But while production has made such great strides in increased efficiency and in steadily lowering costs and prices, distribution has become more chaotic, and more expensive. With the demands of the public for added expensive services of many kinds, the commercial warfare resulting from the attempts of manufacturers to change or control the methods of distribution and the crowding of the field with unnecessary and inefficient distributors, the distributive branches of our industries instead of handling this greatly increased volume at lower costs, confront us with a steadily increasing comparative cost.[2] Basically, of course, the problems of the two branches of industry are different. In manufacturing, the machine is dominant. In distribution the man and the human element is the controlling factor which does not permit either of standardization or decreasing costs when the cost of living is steadily rising.[3]

[1] TIPPER, "The New Business," p. 114, 116.

[2] CHERINGTON, "Advertising as a Business Force," pp. 30, 44; TIPPER, "The New Business," pp. 27, 92.

[3] TIPPER, "The New Business," p. 133.

The greatest single agency making for improved distribution is advertising. Without it effective distribution of the products of commerce would be greatly hampered. The growing intelligence of our people combined with our great system of communication through magazines, newspapers and other media has furnished the means whereby the seller of goods can sell to the multitude through the printed word where the salesman can only reach the individual.

But there is a tendency for competitive advertising to become more and more wasteful when the advertising policy of "dominating the market" is followed. If adopted by all competitors in an industry, such a policy may result in forcing an added expense on the already excessive cost of distribution to the consequent detriment of society. There is, of course, no doubt that an individual manufacturer advertising his particular product may create and enlarge demand for it and that the greater volume of production secured may reduce his overhead and selling costs and even his manufacturing costs.[4]

The lowered cost per unit may more than recoup him for his advertising expenses permitting him to lower his prices to the benefit of the public. It is beyond doubt also that the cumulative effects of many individual advertising campaigns may create demand. Many industries are constantly coming into being whose first problem is the creation of new buying habits and wants. It is unquestionable too that advertising by half selling the product reduces selling costs by lessening the time and efforts of distributors and salesmen in making sales. But there is a law of diminishing returns on advertising. It is doubtful whether the use of competitive advertising by all concerns in an industry will be an economic saving to the industry unless all unnecessary wastes and duplications are avoided. It must be conceded that to the extent it supplants or increases the efficiency of more cumbersome and expensive methods of salesmanship, advertising justifies itself economically but when it fails to do this it becomes merely a new and costly competitive weapon of benefit to the individual seller, but of doubtful benefit to society. In reality wastes of advertising are chiefly the

[4] CHERINGTON, "Advertising as a Business Force," p. 430.

wastes of competition and may in fact be less wasteful than other selling methods they supplant or in part supplant.

But competitive advertising of a particular brand of a particular commodity by an individual manufacturer represents only one of the functions of advertising. Whatever may be the economic value of competitive advertising between individuals, there can be no doubt that coöperative advertising offers to an industry an exceptional opportunity for creative accomplishment and for action as a composite, unified whole where individual members of the industry are now working at cross purposes. Ultimately, too, this form of advertising may make possible a substantial reduction of individual competitive advertising, thus reducing the wastes which some economists condemn. Advertising has given to American industry a voice where before it was speechless. By this medium the message of a great industry free from all contradictions and misrepresentations can be carried into millions of homes. The use of advertising affords protection against prejudices and unjust attacks and an opportunity for beneficial effort of which several hundred industries have availed themselves with substantial and lasting benefits.

Uses of Coöperative Advertising.—Association advertising to justify itself must function more effectively than would the advertising of individual units. Its uses therefore must generally be confined to ends redounding to the common weal of the entire industry. There are many purposes for which advertising may be so employed.

Enlargement of Demand.—The most customary use of cooperative advertising is to create and control the demand for the products of the industry. It may be employed to enlarge the demand through the presentation of the merits of the product. How much more force and conviction should the message of an industry carry than the advertising of an individual concern which is concerned more with convincing as to the merits of a particular brand. Most of the association campaigns have as one of their purposes direct salesmanship of this character. A number of associations have found it profitable to conduct educational campaigns designed to indirectly create a demand for their products. The Portland Cement Association has expended large sums in portraying the need for and economic ad-

vantages to the community and to the nation flowing from the construction of good roads, thus tending to create a demand for road building materials. The merits of concrete for such a purpose are of course emphasized. The American National Live Stock Association, the National Wool Growers' Association, and eighteen other state cattlemen's associations of the country, have united in an advertising campaign urging the value of beef as a food, which campaign to the extent it was successful would of course reach down through the packers to the producers. The Clay Products Association has advertised to create public sentiment in favor of better sanitation, knowing that an enlarged demand would benefit clay products along with competitive products.[5] The Glass Container Association of America not only itself advertises the merits of glass containers but contributes to the advertising campaigns of other associations whose products are sold in glass containers.[6] The Spring Wheat Crop Improvement Association, a temporary organization of bankers, merchants, implement dealers, millers and others in the Northwest, knowing that an enlargement of the buying power of the farmers would create an added demand for their products or their services, engaged in a campaign of education of farmers to increase the planting of wheat.[7] The American Bankers' Association has endeavored by advertising to educate the public in habits of thrift, the indirect result of which is to increase bank deposits. Working hand in hand with the research bureau of an association, advertising can also create demand by educating the public as to new uses of the product. Striking examples of this may be seen in the extent to which coöperative organizations of producers such as the California Fruit Growers' Exchange, the California Associated Raisin Company, and the American Cranberry Exchange have increased the demand for their products by educating the housewife as to many appetizing and novel ways to use these products. The Portland Cement Association, by pamphlet and other forms of advertising, has presented to the public every conceivable use of concrete, ranging from steamships to fence posts, from highways to tennis

[5] *Printers' Ink*, July 22, 1920, p. 113.

[6] *Printers' Ink*, Dec. 23, 1920, p. 25.

[7] *Printers' Ink*, Feb. 26, 1920, p. 141.

courts. The lumber associations, such as the Arkansas Soft Pine Bureau, have not overlooked the sale of their products, even for such a limited use as toy building by children. The Oak Flooring Manufacturers' Association by a campaign urging the laying of oak flooring over old flooring created a heavy demand for a new grade of flooring specially designed for such use. The Electric Hoist Manufacturers' Association is continually studying the new uses to which electric hoists and similar machinery may be put and educating particular industries through advertising as to the possible use of such machinery in such industries.[8] The education of the consumer as to the proper methods of preparing a product in order to secure the best results also tends to enlarge demand. The American Cranberry Exchange, for example, has found it desirable to educate the housewife as to the proper methods and proper utensils to use in cooking cranberries.

Modifying Seasonal Demand.—To some industries, the problem of modifying the seasonal character of the demand is of far greater importance than the enlargement of it. The seasonal industries are confronted with waste in tied-up capital, in loss of efficiency in labor, and other factors which have burdened the public with higher prices and reduced demand. Coöperative advertising has proved its usefulness in changing the buying habits of the people and stabilizing the demand in industries of this character. The California Associated Raisin Company, an association of producers, has through advertising made the raisin an article of every day consumption, although a few years ago it was a holiday product. The American Cranberry Exchange has accomplished somewhat similar results. The florists are rapidly stabilizing the sale of flowers. The United Waist League is endeavoring by advertising to secure greater stability in the demand for its products. The coal industry and some of our other industries emphasize the great need of a gigantic educational campaign coupled with a price inducement which will flatten out the curve of demand and lessen the burden on operators, on labor, and on the public.

Education of Distributors.—One of the problems of distribu-

[8] *Printers' Ink*, April 8, 1920, p. 19.

tion is to secure the hearty coöperation of dealers in the product. The friendship of the dealers toward the products of an industry is of far greater value so far as the prosperity of the industry is concerned than the good will toward a few individual brands secured by a few manufacturers in independent advertising campaigns. In some cases the distributors may be prejudiced against certain products through a lack of knowledge of their merits or of the proper methods of installation. The Clay Products Association found it necessary through an advertising campaign to educate distributors as to the real merits of their products and to secure their coöperation in pushing their distribution.[9] The American Hardwood Manufacturers' Association were compelled to educate the trade as to the proper method of seasoning gum lumber before they were able to secure a proper distribution.[10] A number of the lumber associations, the brick associations, the cement associations, in fact many associations have found it desirable to win the good will of distributors not only through a general advertising campaign but also through a limited campaign directed specifically at the distributors. Trade journals and other media have been employed to secure their maximum interest and coöperation in sales.

It may be desirable also to educate the dealers as to better selling methods. The Oak Flooring Manufacturers' Association found the practice of retailers in quoting flooring per thousand feet created a false impression in the minds of prospective purchasers that the price was excessively high. By an advertising campaign, the association persuaded dealers to quote a lump sum per room on queries of prospective purchasers, which has had a considerable effect in stimulating demand and overcoming sales resistance.[11] The Knit Goods Manufacturers of America publish a special trade paper containing educational data designed especially to help the dealer conduct his business on a better basis.[12]

[9] *Printers' Ink*, July 22, 1920, p. 113.

[10] Letter, C. E. Van Camp, Manager Gum Department, American Hardwood Mfrs'. Assn., July 7, 1919.

[11] *Printers' Ink*, Nov. 4, 1920, p. 93.

[12] *Printers' Ink*, April 8, 1920, p. 133.

Protection Against Competing Industries.—While most association advertising campaigns are concerned primarily with the creation of demand, competitive advertising to protect the existing demand for the products of the industry may be of tremendous importance. Lumber, brick, cement and hollow tile all compete vigorously in the building market. Lime competes with gypsum and cement. Shingles compete with slate, tile and patented roofings. Wooden auto wheels compete with wire and other metal wheels. Butter competes with oleomargarine. One food competes with another. There are dozens of industries engaged in vigorous competition. The industry which does not advertise is apt to find the general demand for its product seriously curtailed, even without the knowledge of the industry as a result of the initiative and effective advertising of competing industries. This is especially true where a member of that industry has no means of securing accurate knowledge regarding the sales of his competitors so as to determine whether the situation confronting him is peculiar to him or general in the industry. Many industries have for years been advertising vigorously to maintain their position in competition with other industries. The National Association of Lumber Manufacturers, the Southern Pine Association, the North Carolina Pine Association, the Southern Cypress Manufacturers' Association, have conducted great campaigns amounting in the aggregate to millions of dollars to maintain the position of lumber as a building and construction material. The Portland Cement Association has conducted an equally comprehensive campaign involving the use of every type of advertising media to increase the use of cement for every possible purpose. The brick associations, such as the Common Brick Manufacturers' Association of America, the American Face Brick Association, and the National Paving Brick Manufacturers' Association, have all engaged in extensive campaigns partly as a defensive measure. The National Dairy Council is working through schools, women's clubs, health organizations, government departments, and is employing various advertising media to convince the public of the superior food value and healthfulness of dairy products as contrasted with their various substitutes. The Allied Broom Industry, a greatly disorganized industry, has organized an extensive campaign de-

signed in part to meet the competition of vacuum cleaners.[13] The manufacturers of linoleum, in order to protect the existing demand for their product, have also felt it necessary to educate the public as to the methods of identifying their product in order to protect the existing demand against the inroads of substitutes. Many other associations are engaged in similar campaigns. The single manufacturer interested in enlarging his own demand deems himself successful if this result is secured. That result, however, may have no bearing upon the prosperity of the industry. The total volume of demand may in fact have fallen off. Is it not the part of wisdom for the members of an industry to keep very closely in touch with the developments in competitive industries and to utilize the full strength of their industry in combating such competition?

Improvement of Quality and Protection of Good Will.—Even within the industry, an association may find it useful to engage in competitive advertising. In most industries there are a certain number of persons who engage in questionable practices, who manufacture and sell articles of inferior quality and injure the good will of the public for the product of the industry. It may be that the mere force of excessive competition has lowered the general level of quality. In such a situation more than one association, whether it is selling a product or selling a service, has found it worth while to engage in an advertising campaign to focus the demand on the product or the service of its members. Among many associations conducting campaigns of this character are the Southern Cypress Manufacturers' Association, the American Association of Advertising Agencies, the American Wholesale Lumber Association, the American Cranberry Exchange, the Common Brick Manufacturers' Association, the National Warm Air Heating & Ventilating Association, and others. In such a campaign it is of course essential either to advertise the names of the individual members of the association, which is often unwieldy or impracticable, or to identify the members or their products by an association trade-mark or insignia. Probably the first and best example of such advertising is that of the Southern Cypress Manufacturers' Assn., whose

[13] *Printers' Ink*, Dec. 30, 1920, p. 60.

members by reason of their physical location, it is asserted, produce a superior quality of cypress. Despite the great difficulty in working out a practical trade-mark for application to a bulk commodity like lumber, the association evolved a simple trade-mark not only identifying the lumber as the product of a member of the association, but also identifying the individual member producing it. This trade-mark combines the utmost simplicity with distinctiveness. A given number is given to each member of the association which is inserted in the center of the trade-mark, with the result that the production of each member is identified. As a result, the individual manufacturer gains the benefit of any good will accruing to him and at the same time the association can check up the failure of any member to conform to the standards of the association. The Arkansas Soft Pine Bureau, the Common Brick Manufacturers' Assn., the National Warm Air Heating & Ventilating Assn., the California Fruit Growers' Exchange, the California Associated Raisin Company, and various other associations, have also adopted trade marks to identify the product of members of the association. Similarly, the American Wholesale Lumber Assn., the Southern Pine Assn., the United Typothetæ of America, the Associated General Contractors of America, and other organizations, have adopted a special insignia used on the advertising, stationery and other papers of the individual members to secure for the members the benefit of the good will of buyers and public toward the organization.

Medium of Contact with the Public.—The second great group of uses for association advertising involves the selling of the industry and its problems to the public. In a democracy where in the last analysis public opinion is the controlling factor in the determination of the attitude of government toward business it is extremely important that an industry should have some direct medium of contact with the public for the presentation of facts, otherwise public opinion may be misguided or controlled by outside factors for ulterior purposes. The need constantly arises for an industry to establish contact with the public. Frank, open advertising usually offers a most effective method of approach.

Thus association advertising may be used to combat legisla-

tion by presenting the viewpoint of industries both to the public and to their representatives in Congress. The Institute of American Meat Packers used advertising on a large scale to fight what they felt to be the injustices of the meat packer legislation, and secured very substantial amendments. The Committee of American Ship Builders conducted a campaign in the daily papers to advise Congress and the public as to what they felt to be the needs of American merchant marine in the way of legislation.[14] The Authors' League of America fought the postal zoning bill through advertising. The day of the old-time lobbyist is done. Industries must present their facts openly and frankly and stand or fall on the facts. Advertising affords one method for a dignified and convincing presentation. Closely akin to this use, was the campaign of the Association of Railway Executives conducted to persuade the American public to give a fair trial to the transportation legislation, a campaign which beyond doubt had a far-reaching effect.

Again an industry may find it helpful to inform the public as to processes and costs as well as to give full advice as to the conditions which may affect or control price. Unfavorable weather conditions, for example, may retard lumber production, producing a scarcity and consequent high prices which if unexplained will arouse public resentment. The failure in the supply of the raw material, the demands of labor and many other causes may force costs and prices to an excessive level. If unexplained, the natural result is a universal belief that the whole industry is profiteering. Would not a nation-wide explanation of the situation by the industry in such instances preserve the good will of the public toward the industry and tend to prevent unfavorable reactions in the form of boycotts, ill-timed legislation and the like? Already we find some of our great industries selling themselves to the public, explaining their difficulties and problems and the causes for results which an uninformed public is apt to resent. The National Association of Lumber Manufacturers has engaged in a great campaign outlining the economic facts underlying the industry and the problems it faces. The Anthracite General Policies Committee

[14] *Printers' Ink*, May 13, 1920, p. 73.

published a number of advertisements explaining the processes and facts which control the price of anthracite.

The National Association of Clothiers has presented facts to establish that the industry is making no more than a reasonable profit on its product.[15] The Associated Cooperage Industries are advising the public as to the reason for the high prices of their products.[16]

Still other branches of American industry have found advertising a helpful medium in educating the public as to the economic value of their services. The increasing cost of living has created a growing feeling fostered in some quarters for competitive or other reasons that the middleman is an economic parasite. The function of the middleman as the great preserver of competition, the services of the wholesaler as banker, as warehouseman, as traffic man and as disinterested salesman are unknown to the general public. The wholesaler more than any other factor in industry needs to acquaint the public with the economic services he performs. The National Wholesale Dry Goods Association and the Wholesale Coal Trade Association of New York have conducted limited campaigns of this sort,[17] but the message of the wholesaler ought to be carried to the public in a compelling way if public movements and legislation based on ignorance of economic facts but working irreparable harm are to be avoided. One association, the Alfalfa Growers of California, reversing the picture, has employed coöperative advertising as a means of attempting the elimination of the middleman.[18] The Trust Company Division of the American Bankers' Association is educating the public through advertising regarding the services rendered by trust companies.[19] The American Optometric Association, the American Association of Advertising Agencies, the National Periodical Association and other trade associations have coöperated in similar advertising programs.

More than one industry has found it desirable to utilize ad-

[15] *Printers' Ink*, March 11, 1920, p. 49.
[16] *Printers' Ink*, March 27, 1919, p. 76.
[17] *Printers' Ink*, Sept. 16, 1920, p. 65.
[18] *Printers' Ink*, May 6, 1920, p. 65.
[19] *Printers' Ink*, Oct. 21, 1920, p. 81; Dec. 9, 1920, p. 105.

vertising as a means of overcoming unfounded prejudices which unchecked may do serious injury to an industry and limit the demand for its products. The National Canners' Association organized their great advertising program in part to overcome the prejudice against canned goods, especially among the foreign elements of our population who because of the long established customs of their own country were not accustomed to eat canned goods.[20] A similar organized effort is that of the Joint Coffee Trade Publicity Committee designed to combat the widespread belief as to the deleterious effect of the use of coffee.[21] The California Olive Association because of a few cases of olive poisoning which received wide publicity were compelled to advertise extensively to get the facts to the public as to the healthfulness and careful manufacture of their product.[22] A number of southern cotton mills advertised in the daily press throughout the country to convince the public as to the conditions and facilities under which their employees worked. To explain away charges that the production of lumber was in the hands of an unlawful trust or combination in restraint of trade and also to correct the false notion as to fire hazards involved in the use of forest products, the National Association of Lumber Manufacturers has at various times appealed to the public through the medium of paid publicity.[23]

Advertising affords to manufacturers and producers a powerful weapon for a partial control of distribution. It frees them to a great extent from the dominance of the distributors by enabling them to establish direct contact with the purchasing public. In times of deflation if distributors are disposed to exact unreasonable profits, the producing or manufacturing branch of the industry by advising the public as to costs and reasonable prices can aid in holding down the price of the commodity. Such, for example, was one of the purposes of the proposed advertising campaign of the Motor Trade Association.[24] While it may be a doubtful business policy for one faction of an

[20] *Printers' Ink*, June 24, 1920, p. 73.
[21] *Printers' Ink*, Jan. 20, 1921, p. 33.
[22] *Printers' Ink*, Nov. 11, 1920, p. 125.
[23] *Printers' Ink*, Feb. 3, 1921, p. 17; *ibid.*, Sept. 2, 1920, p. 110.
[24] *Printers' Ink*, April 8, 1920, p. 20.

industry to utilize advertising for this purpose, there is no doubt that it can be so used. Any united use of advertising to in any way control distribution should never be attempted without first securing the advice of an attorney.

Other Uses.—Trade associations have found advertising of value when used for many other purposes. The nation-wide advertising campaign of the United Typothetæ of America was a very important part of its program of education which rehabilitated the printing industry and established a much better morale among its members. The Needle Trade Association of Maryland found advertising an economical method of securing an adequate supply of labor for the industry because of the greater effectiveness of larger space in portraying the attractive working conditions in the industry.[25] The Spring Wheat Improvement Association, as already mentioned, used the force of advertising to secure an enlarged planting of wheat. The Logan District Mines Information Bureau is employing advertising as a means of winning public sympathy in the fight of the mine operators against the unionization of the West Virginia coal fields. The Philadelphia Painters' District Council has appealed to the public for better working conditions through advertising.[26] It is not at all impossible that trade associations might through advertising carrying an appeal to their workmen increase the efficiency of their labor, increasing morale and cutting down labor turnover, just as individual companies such as the Pierce Arrow Company and the American Multigraph Company have done during the past several years.[27] Indeed, to almost every need or problem involving a relationship between the industry and other great groups in the community a forceful, dignified message by the united industry through recognized advertising mediums can be of great help.

Results.—When a group of level-headed business men such as the manufacturers and distributors of paints and varnishes increase their advertising appropriations after several years of experience from $140,000 to $700,000 per annum,[28] their belief

[25] *Printers' Ink,* Oct. 9, 1919, p. 140.
[26] *Printers' Ink,* April 22, 1920, p. 41.
[27] *Printers' Ink,* July 24, 1919, p. 45.
[28] *Printers' Ink,* Dec. 9, 1920, p. 111.

in the value of coöperative advertising is given a rather forceful expression. The largest results of advertising are often intangible results which we are very much prone to undervalue. The effect of advertising in preventing hostile legislation and in maintaining a friendly relationship with the public may result in the most far-reaching benefits to an industry. One of the most common purposes and one of the greatest benefits of coöperative advertising is the creation of that intangible value, —good will,—good will toward the product, good will toward the industry. Good will unfortunately cannot be forthwith measured in dollars and cents. The proceedings of more than one trade association present eloquent testimony as to the value many business men place on the results attained through association advertising.[29] Another intangible but important result is the effect on the personnel of the industry. To quote the words of Noble T. Praigg, Advertising Counsel for the United Typothetæ of America, contained in a letter to the writer: "It is the history of all advertising campaigns that the employees of the enterprise or industry advertising come to regard the advertising as their own personal expression. They are proud of what it says about their industry and they like to live up to the policies which the advertising sets forth. This of course is a completely intangible benefit but is of incalculable value." But much more tangible results in many industries can be cited. In 1914 the manufacturers of gum lumber found the European market shut off with only a very limited demand in the United States because of the lack of understanding as to how to properly season the wood, in order to prevent warping and twisting. The demand was so small that existing prices did not cover cost of production. Organizing a great advertising campaign of education coupled with effective trade extension work, the American Hardwood Manufacturers' Association has created a demand exceeding 300,000,000 feet annually, and gum lumber is now used in almost every line of cabinet work as well as for many other purposes for which other lumber is used.[30] The Granite Manufacturers' Assn. located in the Barre granite dis-

[29] See, for example, *Proceedings*, National Warm Air Heating & Ventilating Assn., 1916, p. 34.

[30] E. C. Van Camp, Manager Gum Department, Letter, July 7, 1919.

trict spent considerable sums in advertising during the war with the result that that section prospered as never before while conditions in competing districts throughout the country were greatly depressed.[31] The American Cranberry Exchange in 1918, despite a season of abnormally warm weather extending into January and an acute sugar shortage combined with government limitations shortening sugar consumption 35 per cent below normal, marketed their crop much more expeditiously than they had theretofore been able to do without advertising. A test campaign in Chicago in 1916 when the association was planning its program increased sales in that territory 50 per cent when sales in other territories fell off. The National Assn. of Greeting Card Manufacturers as a result of war saving propaganda were faced with what appeared to be a forty per cent demand in 1918, but a hastily organized coöperative advertising campaign secured for them the greatest demand in the history of the business.[32] The campaign of the Stoneware Manufacturers' Association, whose products were gradually going out of use, resulted in an increased demand for every type of their product, every manufacturer being oversold within one year.[33] The Arkansas Soft Pine Bureau by a campaign continuously conducted since 1912 have corrected the erroneous ideas of contractors and builders as to the value of their product for interior finish and greatly increased the demand.[34] As a result of the coöperative advertising campaign the consumption of coffee increased twenty-one per cent in two and one-half years.[35] The Philadelphia Laundry Owners' Exchange by advertising urging the housewife to lessen her household burdens by a larger use of laundry facilities increased the size of the average package from 30 cents to $1.25.

Financing a Campaign.—The financing of a coöperative advertising campaign so that all parts of the industry receiving benefit will contribute fairly to its support, involves questions

[31] Letter, Athol P. Bell, Secretary, July 10, 1919.

[32] *Printers' Ink*, Dec. 11, 1919, p. 134.

[33] *Printers' Ink*, May 20, 1920, p. 80.

[34] A. S. Lee, Asst. Secretary, Arkansas Soft Pine Bureau, *Southern Lumberman*, Dec. 17, 1921, p. 140.

[35] *The Spice Mill*, December, 1921, p. 2169.

of great difficulty. A great campaign such as that carried on by the paint and varnish industry required much preliminary work to get paint manufacturers, varnish manufacturers, jobbers, master painters and others interested. Even the tea growers of Formosa, Ceylon, Java and other foreign territories were solicited to contribute to the advertising campaign of the Tea Association of America.[36] It is a wise policy to delay the opening of a campaign until adequate funds and the real interest and coöperation of all elements of the industry are secured. There are several methods of raising money for such a purpose. First, some associations have relied entirely upon voluntary contributions of any amount by its members. The National Warm Air Heating and Ventilating Assn. raised $25,000 for its first campaign by voluntary subscription.[37] The Wholesale Dry Goods Assn. raised an advertising appropriation on a voluntary basis, each member, however, impliedly making his contribution on the basis of his volume of business. The National Assn. of Greeting Card Manufacturers followed a similar plan, the executive committee however making suggestions as to what they felt the members should contribute.[38] The American Wholesale Lumber Assn. conducted a considerable trade journal campaign relying entirely upon contributions of advertising space by its members, due credit being given to such members for their generosity. The method of raising funds by voluntary subscription without any attempt to adjust the size of the subscriptions between the different members of the industry is very unsatisfactory. The life of the campaign is uncertain; it is likely not to be well organized; and the burden placed upon the generosity of individual members is unjust and unfair when the result of advertising reacts to the benefit of all members of the industry.

Secondly, the advertising appropriation may be based on a fixed percentage of the sales of each company. This method becomes impracticable when different branches of the industry are contributing as the retailers' volume of sales for the same quan-

[36] *Printers' Ink*, Jan. 27, 1921, p. 86.
[37] *Proceedings*, 1916, p. 20.
[38] *Printers' Ink*, Dec. 11, 1919, p. 134.

tity of goods will be higher than the wholesalers or manufacturers because of his higher price level. This method also accentuates the sales idea tending to cause dissatisfaction among contributors when the purpose of the campaign may not primarily be the stimulation of sales.

Third, the assessment may be based upon the gross shipments of the members as is the practice of the American Face Brick Assn.[39] The assessment of the Oak Flooring Manufacturers' Association is based on estimated shipments of each member for the year. The members are billed in advance on this basis, subject to readjustment being made twice a year on the basis of actual shipments made. In this way, the association gets its funds in advance to meet all bills promptly and through the readjustment all members are placed on the same footing as they would have been if the assessments were paid after actual shipments were made.[40]

Fourth, the total production of the members may be made the basis of the assessment. This is the method employed by the White Pine Bureau.

Fifth, probably the most common and most successful method of an assessment is on a certain unit. For the Assn. of Rice Millers of America, the assessment is a certain charge per barrel; for the Granite Manufacturers' Assn., per cubic foot; for the Tea Assn. of the U. S., per pound; for the Allied Broom Industry, per one thousand brooms, and so on. Even this method may be difficult for application where the unit varies greatly in value and there is a highly specialized production or handling of the product by some members. The Cycle Trade of America, Inc., finds itself in the fortunate position where the assessment can be based on a single part indispensable in the manufacture of bicycles and motorcycles.[41]

Whatever method of assessment is used, it is vital that the program be formulated for a long pull. Much money has been wasted in the past in poorly planned one-year campaigns. An association ought rarely to engage in an advertising campaign without first tying up the contributors by contract for a period

[39] *Printers' Ink,* Oct. 28, 1920, p. 64.
[40] *Printers' Ink,* Nov. 4, 1920, p. 100.
[41] *Printers' Ink,* Aug. 11, 1921, p. 19.

of three or preferably five years. The advertising campaign of an industry involving as it often does the education both of consumers and distributors and the overcoming of long existing prejudices requires time. The building of a permanent good will cannot be accomplished overnight.

Advertising Methods.—It is impossible within the scope of this chapter to describe the methods employed by many associations in their campaigns. Every advertising medium has been employed. Government departments, women's clubs, county agents' meetings, public schools, colleges, universities, boards of health have all been utilized where their coöperation was proper and effective. The ancient fair idea has been employed in such great exhibitions as the National Automobile Show, the National Dairy Show and the annual exhibition of the Assn. of Ice Cream Supply Men. The most modern of inventions such as the motion pictures and the radio are being utilized everywhere. One striking characteristic of the most successful association advertising is the use of a timely slogan which emphasizes the basic idea of the campaign and through repetition imbeds itself in the consciousness of the buying public. Such slogans as "Say it with flowers," "Save the surface and you save all," or "Concrete for permanence," are known to nearly every one; and each of them expresses a clear definite idea underlying the advertising.

Pitfalls of Association Advertising.—Advertising has become a great science involving a comprehensive knowledge of psychology, of salesmanship, of economics, in fact of all the problems affecting business. The formulation of an association campaign involves a careful study of the product and its relation to competitive products, an analysis of existing and potential markets, a knowledge of the factors and methods of distribution in the particular industry. Advertising has a technical side of its own. Only an expert can know the relative values of the different advertising media in interpreting a product or an industry to the audience it is desired to reach. The formulation of a great association campaign, the preparation of advertisements and advertising literature, the devising of effective means of securing the coöperation of all branches of the industry and of many other organizations requires the utmost skill.

Some conclusions or recommendations derived from the ex-

perience of various associations can be stated with a reasonable assurance.

First, it is unwise for a trade association not to employ an advertising agency of the highest caliber preferably with association advertising experience for a campaign of this sort.

Second, ample time must be given for the raising of funds, planning of the campaign and the establishment of contact with the many elements participating directly or indirectly in the campaign. An association campaign of national scope requires coöperation not only with the distributing branches of the industry but often with many public organizations which may require great diplomacy and tact. Advertising experts must study the problems of the industry. Time taken to raise a generous advertising fund and to develop a well thought out plan, is time well spent.

Third, the campaign should be financed for at least three years. In dealing with the intangible results which for the most part flow from associated advertising, results cannot be secured or measured in one year. The first year of most association campaigns has been a disappointment and unless the members clearly understand this fact and bind themselves to support the effort of an association for a fixed period, the program is in danger of collapse before it is well started.

Fourth, the control of the campaign should be placed in a very small committee consisting of men in whom the other members have the highest confidence. The paint and varnish campaign, probably the most effectively organized and conceived campaign in trade association history, is in the hands of a small committee composed of the advertising directors of several companies in the different branches of the industry. These men serve without compensation. Both curtailment of expense and expedition of action require a small committee which can meet often for consultation with their advertising agent. This is especially true during the first year when the selection of an advertising agency may involve consultation with many agents and the consideration of many proposed plans.

Fifth, complete publicity of the details of the proposed plan should be furnished the individual members. Competition makes business men naturally suspicious. They are fearful that the

moneys appropriated for advertising may be used to the indirect benefit of certain individuals or factions. A small committee to retain the confidence of the association members should advise the membership fully of its plans.

Sixth, the utmost care should be used to see that if possible the advertising represents the unanimous voice of the members. If so worded or employed as to favor any group or product over another, the whole program will be quickly wrecked.

Seventh, an effective plan must be devised before the campaign is started so that inquiries resulting from such advertising if they involve possible sales shall be made available to all members interested on a fair impartial basis.

Finally, the means should be provided for tying up the national campaign with the advertising campaigns of individual members. Trade-marks, insignia, slogans or other methods may be employed to enable each member of the association to directly capitalize the good will secured by the association campaign. The paint and varnish industry has an executive manager available to assist all the members in their sales promotion work and to synchronize individual campaigns with the big national program. Such coöperation not only utilizes the full force of the national campaign but also impresses the members with the value of association advertising. The use of any such marks or insignia as part of a plan to fix prices would of course be unlawful.

Legality.—There can of course be no question as to the legality of association advertising when used to accomplish the purposes outlined in this chapter. Advertising or any other device if used as a means of restricting trade is unlawful.[42] The usual purpose of advertising is to stimulate rather than to restrain trade. But it is possible for advertising to be used as a means of restraining competition. Association advertising tied up with a common trade-mark might conceivably be used as a price fixing agency.[43] Advertising could be used as the medium for libeling the products of a competing industry or as a black-

[42] Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922, Appendix J.

[43] Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922, Appendix J.

list or to procure a boycott. It could be used to misrepresent conditions in the industry, and through such deception of the buying public to procure a high level of prices. It could be used to bring about restriction of production or other unlawful results. Such uses by an association, however, are rather improbable. It is an established rule of law that a lawful act may become unlawful when used to accomplish an unlawful purpose. There is no reason why this rule would not apply to advertising as to any other act.

Moreover, at least 28 states have enacted statutes prohibiting the publication or circulation of false or misleading advertisements concerning property offered for sale.[44] These statutes are for the most part comprehensive in their terms although not effectively enforced.

There is little possibility of the violation of any law in the advertising of a trade association. The advertising of a trade association is subjected to so close a censorship in order to represent the united opinions of an industry, and the policies of the association are so closely controlled by men of high standing and prestige in the industry, that its quality is certain to be high. The betterment of advertising since the days of the circus and patent medicine advertising has been remarkable. Through such agencies as the Associated Advertising Clubs of the World. the American Fair Trade League, and other organizations, business men are policing their own advertising in a splendid way.

Coöperative advertising is one of the finest developments of the trade association movement. It has enlarged the field of advertising, giving added weight to this rapidly growing force in our industrial life. It has created markets where no markets existed, removed friction and misunderstanding between producer, manufacturer and distributor, bettered the relationships between industry and government, and brought industry and the general public into friendly and intelligent contact.

[44] Report of Joseph E. Davies, Commissioner of Corporations, on Trust Laws and Unfair Competition, 1915, p. 517.

CHAPTER X

TRAFFIC AND TRANSPORTATION[1]

THE overshadowing importance of our transportation system to the economic life of the nation has been emphasized by the war and the developments since the war. The increased efficiency of transportation has probably been the greatest single factor enlarging competition until it has become national and often international in scope. Production and distribution,—indeed the industrial life of America,—depends upon the swift interchange of goods through the medium of the railroads. Policies and methods of railroad operation operate directly and powerfully to retard or advance the commercial development of cities, regions, industries and in fact of the nation. Despite the direct pecuniary interest involved in the transportation situation, despite the uncertain and fluctuating policies of governmental regulations which may greatly aid or greatly harm American industry, the shipping public, generally speaking, has always been inadequately organized to properly protect its interest either in its dealings with the carriers or before governmental tribunals.

Our system of transportation, our methods of rate making, our plan of regulation are all the products of a slow evolution in which the varying practices and methods of different regions developed under varying physical and economic conditions and under a highly competitive system of railroading are being gradually standardized and unified or modified as a result of wider experience. Our rate structure is complicated and in no sense final. In discussing rates, the Interstate Commerce Commission once well said:

"The Commission is dealing with a difficult problem, involving multitudinous effects and an infinite variety of modifying conditions

[1] JOHNSON AND HUEBNER, "Railroad Traffic and Rates," published by Appleton, is a comprehensive treatise to which I am indebted for considerable information contained in this chapter.

which make the establishing of principles and the framing of policies a matter of slow evolution." [2]

The transportation situation is never static. The steady development of new industries, the gradual shift in production of some of our basic commodities such as cotton and lumber from one region to another, the shifting of the primary markets, the changing character of the traffic in some industries springing from new methods of manufacture or transportation, the opening of new transportation routes, the effects of water competition, the development of truck competition, the requirements of regulatory bodies and many other factors create an ever-changing situation which may adversely affect industries in the most surprising ways. There are many phases of transportation which may directly and seriously affect an industry. As to all such matters clearly the industry can most effectively operate as a unit.

Rates.—First in importance, of course, come the rates. The rate structures of this country are constructed in different ways. In the South, the basing point system prevails. In the East, the percentage tariff system is employed. In the middle west, a system of rate making based on fixed differentials above or below the rates at the dominating trade centers at main river crossings is used while on transcontinental rates a system of blanket or common rates from a large Eastern territory on West bound traffic has been installed with a graded zone system on East bound traffic. These varying rate systems are delicately balanced and changes in one often have a far-reaching effect on another. The natural tendency is toward a gradual standardization of the methods of rate making but in this process of readjustment actions crippling industries are almost certain unless they are organized to present facts to fully combat any such proposed action.

While there has been a tendency among many business men to assume that their transportation costs did not handicap them providing the same rates were paid by all their competitors, the developments of the past few years have proven that a high level of rates can depress business and work great public harm.

[2] Advance in Rates: Western Case, 20 I. C. C. 307, 379.

The horizontal rate increases of the past few years have paralyzed the distribution of some of our low grade commodities. The movement of lumber from the Pacific Coast has been stifled by the increase. The movement of live stock and of grain has been greatly retarded. The effect of these horizontal increases imposed on all industries has been clearly outlined in the following language of Secretary Hoover and emphasizes the importance of the maintenance by every industry of a skilled traffic organization to give constant consideration to such matters:

"Horizontal rate increases have thrown the relativity of these rate scales out of gear; both as to value of commodities and zones of distribution. The increase of the rate may amount to 5 per cent on the shippers' value of some commodities and 80 per cent on others.

"Our great industries have grown up in the supply of the cheapest transportation in the world for their basic raw materials, with a higher differential on their finished products. We have many complaints of the hardship worked by the upset in ratio; complaints that it is readjusting the commercial and industrial map of the United States; complaints that in some industries the charge can be passed on to the consumer, while in others, such as agriculture, it falls largely upon the producer; and complaints that it is stifling production." [3]

Competitive Rates.—Again most industries have competitors. Lumber competes with brick. Lime competes with cement. Shingles compete with prepared roofing. Butter competes with oleomargarine. There are a long line of competing industries in this country, yet it is safe to say that only the well organized industries pay attention to the rates on competitive products. Many industries are wholly unorganized so far as action is concerned in maintaining their product on a parity with competing products from a rate standpoint. The fixing of rates on different commodities is at best an inexact science because of the difficulty in determining and allocating the costs of transportation between different commodities and of the necessity of giving due weight to other factors such as competition between the carriers, water competition, and so on. Industries must be vigi-

[3] Address of Hon. Herbert Hoover, Secretary of Commerce before the Chamber of Commerce of the United States, Atlantic City, May 7, 1921.

lant if they are not to be discriminated against in an indirect way, —a discrimination of which they may not be even aware without an expert traffic organization to ascertain their rights in the situation.

Rates on Raw Materials.—Important too are the rates on raw materials. Every industry is interested in getting its raw materials at the lowest possible price. The whole question of readjustment of rates of basic commodities compelled by the wholesale destruction of existing relationships which flowed from the horizontal rate increases, makes it important that industries should make their weight felt before the Interstate Commerce Commission and other governmental bodies in securing normal rates on their raw materials. Such action is essential if costs are to be reduced and business permanently revived.

Import Rates.—Again import rates may be of considerable moment to an industry. The practice of the carrier in granting low import rates from the large importing centers to the interior can partly nullify the operation of a protective tariff. On the other hand, such rates if granted on raw materials may be of great help to an industry. Import rates because they are not ordinarily used by the American manufacturer may be entirely overlooked by them to their consequent prejudice.

To industries which export a considerable volume of goods, the export rates may be of importance in aiding the sale of their goods abroad. In fighting for attractive export rates, and in acting as a medium for expert advice and assistance to members on their foreign shipments, a skilled traffic organization can be of great benefit to an industry. Not only the rates but such matters as wharfage, handling and storing charges, demand close scrutiny. Such matters are of course in the domain of the expert traffic man.

Classifications.—*Carload weights; mixing privileges, etc.*—Changes in the classification of commodities for transportation purposes also require consideration. A large volume of our commerce moves under so-called class rates. The commodities of commerce are ranged in different classes, each class taking a different rate. The shifting of a commodity from one class to another can result in a substantial increase in rate. The silk industry was but recently threatened with irreparable injury

through an attempt of the carriers to remove certain silks entirely from the consolidated freight classifications. This effectively organized trade association after strenuous litigation forestalled such action. Changes in the estimated weights of commodities received for transportation may force heavy increases on industries as shown by the recent changes in the express classification. Carload minimum weights may be fixed in such a way as to work inconvenience on an industry as for example where loads are fixed at so high a figure that certain commodities cannot be loaded in many of the ordinary cars in use. Or if such minimum is set too high, smaller competitors can be seriously crippled in the distribution of their product. The differences in carload and less than carload rates may be so large as to work great injustice on the smaller units of an industry. The mixing privilege, *i.e.*, the right given to ship various commodities in the same car, sometimes at the carload rate, sometimes at less than carload rates, can be made so generous as to greatly aid one industry over another. The great meat packers, through the generous mixing privileges granted them by the carriers were making huge inroads on the business of the wholesale grocers in groceries because of the advantages in lower rates, convenience and expedition of shipments secured through being able to ship packing house products and groceries in the same car. It has required the services of expert traffic attorneys and the expenditure of large sums of money by the National Wholesale Grocers' Association to even partly correct this situation. Packing requirements are constantly being changed, sometimes forcing needlessly expensive packages upon an industry unless successfully combated. The manner in which goods are packed also frequently determines the freight rate applicable. Car service rules, spotting charges, demurrage charges, penalties, refrigerator charges, are often the medium used to force unreasonable burdens upon the public. The wholesale lumber trade has but recently secured the elimination of a prohibitive penalty on lumber cars detained which seriously interfered with the wholesale distribution of lumber and which was imposed without regard to the relative responsibility of carrier or shipper for detention of the car.

Private Cars.—The private car is rapidly developing into

an intolerable abuse in our transportation system. It is a most convenient vehicle for discriminations and other unfair practices. The private car, for example, is rapidly monopolizing the distribution of dairy products to the smaller towns in the hands of the great meat packers by reason of the fact that the volume of traffic moving to these smaller towns will not warrant the maintenance of both a public refrigerator car system and a private refrigerator car system. The control of a large part of the volume of the traffic by the packers plus their control of private cars places them in a position to prevent the installation of a public refrigerator car service to thousands of towns thus excluding their smaller competitors. The packers are also permitted to use private refrigerator cars for the transportation of non-perishable products mixed with perishable goods which not only wastes space in such cars which, in view of the refrigerator car shortage in the country could be filled with perishable goods, but also enables them to secure an expedited delivery on their non-perishable groceries. This is a form of competition which the wholesale grocers shipping by freight or scheduled refrigerator car find very difficult to meet. Again the maintenance of organizations of inspectors to trace and expedite the movement of private refrigerator cars is certain to result in an unfair discrimination so far as the movement of commodities is concerned if not even to greater abuses. The private car situation demands the most careful consideration by any industry affected by it.

Transportation Emergencies.—In times of transportation emergencies, the expert organization of an industry from a traffic standpoint is of the utmost value. Our railroads have not developed in recent years in proportion to the great increase in productive capacity of American industry. The past year there has been a large increase in the number of bad order cars still further limiting the ability of carriers to meet the transportation demand of the country. Car shortages have occurred in the past under more favorable conditions; it is certain that serious car shortages, congestions at terminals and partial break-downs of our transportation system will occur in the future. With every such emergency come embargoes, priorities, penalties and other burdens on the shipper which have disas-

trous effects on industry. The administration of embargoes during the war, when embargoes were imposed and lifted without any notice whatsoever to the shipping public, when even the agents of the carriers had no accurate knowledge concerning embargoes and the readiness with which they were imposed by the carriers with little consideration of the possible harm done to a particular industry affected has shown not only the necessity of the organization of an industry to protect itself against their unnecessary imposition but also the great need for a system of regulation of the manner of imposition and operation. Priority systems which not only involve distinction between so-called essential and non-essential industries but are also administered under the strongest political pressure of representatives of different sections of the country, can create a situation of great peril to many industries. Penalties sometimes induced by competitive interests seeking an undue advantage in the distribution of their product may gravely prejudice the interests of a section of an industry.

The widespread dissatisfaction with the Transportation Act of 1920, and the demand for amendments and changes make it certain that the powers of our regulating bodies and their relationships with the railroads will be changed to a considerable degree in the future. Indeed all legislation must be adapted to changing economic conditions. Every industry, especially those in which transportation costs represent a large part of the cost of distribution, should be in a position to aid intelligently in the formulation of wise legislation. With the principle established by statute that the carrier shall establish rates high enough to permit the carriers, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an amount equal to a designated percentage (to be fixed by the Interstate Commerce Commission) of the value of their properties held for and used in the service of transportation, it also becomes important that every industry should scrutinize the costs of operation of the carriers. If labor costs are abnormal, if excessive prices are paid for supplies through interlocking interests between the railroads and supply houses, if exorbitant sums are expended on car repairs by outside concerns, if the movement of cars is

being generally interfered with through the widespread use of improper influence or the bribery of railroad employees, it is the duty of every industry to be in a position to marshal facts convincingly and comprehensively for the protection of the industry and of the general public. The railroad business is not a private business. It is in its very essence a public business affecting every shipper and in which properly he has and should exercise a direct personal interest through the organization of his industry.

It is surprising in view of the importance of the relations between transportation and industry that American industries are not better organized to handle traffic matters. The larger cities through their local Chambers of Commerce and traffic managers are zealous in preventing discriminations between localities or any other injustices which so easily spring from changes in transportation policies or rates. Some of the states through their railroad commissions also function effectively to protect the interests of their particular state but most industries have no traffic organization, trained and competent to handle the constantly recurring situations which affect the interests of that industry as a whole.

Association Methods.—Generally speaking, there are four methods for the handling of traffic and transportation questions by a trade association. First, such problems may be handled by a regular standing committee. Second, an independent expert traffic association may be employed. Third, an expert traffic bureau may be developed within the association. Fourth, an entirely separate traffic association giving its attention solely to traffic questions may be organized.

The committee method is by far the most common, nearly every association having its traffic committee. Usually the members of a committee are business executives rather than traffic experts. They find it difficult to spare time for work of this character and when attending hearings are unable to make the detailed preparation necessary to the most successful presentation of their case. If the committee is composed of men of traffic experience who are generous of their time, it is of course an inexpensive and reasonably effective method for an association to adopt. Some associations, as, for example, the National

Wholesale Grocers' Association, the American Wholesale Lumber Association, the National Association of Sand and Gravel Producers, have handled some proceedings of great importance by this method in a most efficient manner.

It is possible also to secure expert service from a number of well-established organizations specializing on expert traffic service. They employ an efficient traffic and legal personnel, maintain complete tariff files and are in a position to quite ably serve an industry. They are of course operating for a profit. They cannot give their sole time to the study of the many transportation factors affecting an industry, varied demands of many clients are made on their time but they afford an economical method of handling traffic litigation and negotiations.

By far the most effective plan, however, for a well-financed association is to maintain a traffic bureau of its own. Then an expert, thorough and continuous study can be made of the many traffic questions affecting the industry, such as the rate relationships between competitive industries, the transportation conditions peculiar to the industry, the incongruities and injustices of the existing rates, the most economical routings and similar matters. Such an organization in the course of time, secures also an expert knowledge of the industry thus enabling them to coördinate their traffic knowledge and their industrial knowledge to the benefit of the industry. Complete tariff files and an adequate traffic library can be developed. Such a bureau can be rapidly made into a most effective branch of a trade association's work. With a skilled personnel including if possible both a traffic man and a traffic attorney and a wealth of traffic data affecting the industry, the association is in a position to quickly meet any traffic situation which may develop with constructive suggestions, expert service and comprehensive facts. A bureau of this kind can be of constant service to individual members in furnishing rate information, information as to embargoes, aiding in securing car supply, handling diversions and reconsignments and so on. Some bureaus of this character are made practically self-sustaining through handling claims of their members, or auditing freight bills on a reasonable basis of compensation. The bureaus of the Pacific Coast Shippers' Association, the Georgia-Florida Saw Mill Association, the North Carolina Pine

Association, the Southern Pine Association, the Associated Cooperage Industries' Association are typical of a number of such bureaus maintained by the trade associations of this country.

It is also possible, particularly if members of an association will not properly contribute to the maintenance of a traffic bureau within the organization, to organize a separate association devoting itself solely to traffic matters. Such an organization will of course effect a high degree of specialization to the great benefit of the industry and its members. The Southern Hardwood Traffic Association composed of some 500 members is a fine type of such an organization. It has worked most effectively in many important cases involving rate adjustments of great magnitude and has saved the industry large sums of money. It also publishes a rate book giving in simplified form the through rates from all producing to all consuming territories. It keeps constantly in touch with embargoes, furnishes correct information to its members on rates, corrects claims, aids its members in securing a proper car supply, in fact performs all the services of a traffic bureau with all the weight of associated activity behind it. Such an organization is apt to be more adequately financed than a traffic bureau within an association because of the difficulty in apportioning the budget between the various activities which always confronts an ordinary trade association.

National Industrial Traffic League.—Fortunately for the shippers of this country, there has also been in existence for some years the National Industrial Traffic League, an organization composed of many trade associations and other organizations of shippers as well as individual shippers. Its purpose is to protect all shippers without discrimination. It avoids all conflicts between industries, confining its activities to the many transportation questions of nationwide scope which affect all shippers. It has come to be recognized by the Interstate Commerce Commission as the great representative of the shippers of this country. Every trade association of this country, regardless of the effectiveness of its own traffic organization, should be a member of this central organization, thereby adding to its effectiveness and firmly establishing one great body

which can speak quickly for the great mass of shippers of the country.

Legality.—There is no question as to the legality of the ordinary traffic activities of a trade association.[4] Where competitive rates or privileges are involved, however, any organized attempt to cripple competitors by securing through the rate on large bodies of the carriers, rates or regulations unfairly burdening competitors, or any attempt by presentation of false or misleading facts to secure similar results through any state or federal regulatory body is unlawful. In recent years there has been evidenced a growing tendency on the part of some associations to misuse government agencies as a means of accomplishing restraints of trade. The thought evidently is that the parties to the restraint can safely hide behind the cloak of governmental action. But unless the facts were honestly presented to such an agency there is no such protection. The deception of an agency of the government would only augment the offense. No more comprehensive and vicious restraint of trade could be devised than the fraudulent procurement by associations from the carriers or from the government of rules and regulations burdensome upon competitors. Such restrictions competitors cannot evade and their effect is usually nationwide.

Section 10, Paragraph 4, of the Interstate Commerce Act to prevent such acts provides that any person who induces or attempts to induce any common carrier, subject to the provisions of the Act, to discriminate unjustly in his favor or against any other consignor or consignee in the transportation of property, or who aids or abets any common carrier in any such unjust discrimination, shall be deemed guilty of a misdemeanor. The penalty is fine or imprisonment or both. Parties to such an action are liable also to the party injured for all damages resulting from their acts.

[4] Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922, Appendix J.

CHAPTER XI

PROTECTIVE ACTIVITIES

Credit and Collection Bureaus.—One of the evils imputed to the competitive system is the lack of control over credits, resulting in inflation, unwise extension of credits, and consequent losses, the burden of which must fall ultimately upon the consuming public. The evil is a real one, but it can be at least partially corrected through coöperation by the business men of each industry. Local trade bodies everywhere have established credit bureaus, which have raised the standards of business relationship in their communities and lessened business costs.[1] Such organizations functioning in a national way in each industry are of considerable value both to the public and to the industry. They tend to reduce the risks and losses which result from unwise granting of credit. They tend to weed out the professional deadbeat whose methods in making purchases are apt to be reflected in equally dishonest methods when dealing with those to whom he sells. They tend to curb undue inflation of credit with its unhealthy reactions and to avoid the needless tie-up of great amounts of capital which could be used for productive purposes with great benefit to society. To the business concern whose distribution is nationwide, which is unable to maintain a close personal contact with its customers, a credit bureau in the trade association of the industry, supported by all the members of the association, is of great value. Its general effect in the improvement of conditions in the industry with consequent public benefits may easily be very substantial.

Protective Methods.—The operation of an efficient credit bureau in an industry is usually much more difficult than the maintenance of such a bureau in a community. The large mem-

[1] For a complete analysis of the organization and methods of local credit bureaus, and a compilation of forms, see "Commercial Organization Credit Bureaus," published by the Chamber of Commerce of the United States.

bership of an association, as well as the very large number of buyers in some industries make it a difficult problem to evolve a system of real value. The organization must, of course, be adapted to the peculiar conditions of the industry. The scope of the work of a credit bureau may be along the following lines.

First, if the membership of the association is small, and the number of buyers not too large, complete credit information can be exchanged. A bureau in such an industry compiling fresh confidential data as to the obligations of a buyer, his pay habits, his business methods as shown by past transactions, his character and general reputation, can be of infinitely greater value to the concern participating in such work, than data secured from any ordinary credit agency. Small compact associations, such as the Tile Manufacturers' Credit Association, or associations whose credit service is localized to a limited territory, such as that of the National Wholesale Lumber Dealers' Association, have been able to develop complete credit information regarding most of the customers of their members. The latter association, through years of operation, has built up a trade history of retail trade purchasers, which is invaluable.

Second, if the number of buyers is large in an industry, it may be physically impossible to go beyond the compilation of information regarding those concerning whom members make inquiry. The wholesale branch of an industry serving perhaps several hundred thousand retailers, for example, can scarcely do more than this. Some associations, such as the Prepared Roofing Association, the Association of Ice Cream Supply Men and the Associated Batting Manufacturers, on inquiry of a member, circularize the members for their experience with the prospective buyer, and a composite report covering his existing indebtedness, and pay habits, as shown by past transactions, is sent to all members who contribute information.

Third, investigation may be made only of buyers concerning whom members may make complaint, the information being kept on file for the use of members, or furnished to all of them in composite reports, coded so as to protect the source of the information. There are in every industry many buyers who habitually engage in sharp practices. They take extra time in discounting their bills or make a practice of filing unjustified

complaints. They claim improper deductions in making settlement, knowing the seller cannot go to the expense of bringing suit for very small amounts. They reject carload shipments, merely to force a lower price, or cancel orders without cause. There are buyers, too, who often change the location of their business with fraudulent purpose. To protect the industries against this class of buyers, the members of the National Warm Air Heating & Ventilating Company report to their Secretary undesirable customers as they develop in their business. The National Boot and Shoe Association maintains a bureau to whom members report flagrant cases of breach of contract or their improper conduct by buyers. Buyers who are reported three times in six months, and those refusing to arbitrate differences, are reported to all the members.[2] The Central Paper Box Manufacturers' Association also has a system of reporting delinquent debtors.[3] The general epidemic of cancellation on the part of buyers during the falling markets of the past several years, has resulted in special efforts on the part of sellers to cope with the situation. The American Association of Woollen and Worsted Manufacturers handles cancellations through its Unfair Practices Committee and in the event the decision of this committee is not accepted by the customer, his name is confidentially bulletined to the members of the association.[4] The silk industry has established a Bureau of Contracts, which reports to all its subscribers the names of the concerns making claims for relief from their contracts together with a statement of the nature and the basis of the claim.[5] This association is employing accountants and technical experts to aid in a fair determination of the facts. The Millers' Exchange has not only developed a system of exchange of data, which gives the members accurate information on buyers who do not perform their contracts, but have also developed a thorough plan of mutual indemnity insurance against losses arising by reason of the refusal of purchasers to perform their agreements.

In some industries there appears to be an equal need for an

[2] *Shoe and Leather Reporter*, Jan. 27, 1921, p. 56.
[3] *Proceedings*, Thirteenth Annual Convention, 1916.
[4] *Printers' Ink*, July 1, 1920, p. 66.
[5] *Ibid.*, p. 68.

agency through which distributors can protect themselves against unreliable manufacturers. Just as there are buyers who engage in shady practices, so too there are manufacturers who delay shipments on their early low-priced orders but find no difficulty in filling their later high-priced orders, or who skimp their grades and ship inferior stuff on a rising market, pad invoices, and what not. Obviously, it is a mutual benefit to every member of any association to have available information as to the experience of fellow members which would protect him against dishonest traders, or those to whom the extension of credit is unwise.

Finally, an association may merely make an investigation or statistical study of general conditions affecting credit, to inform the membership of existing conditions and their trend. The National Wholesale Druggists' Association compiles information annually, showing the average number of days' time taken by buyers for payment of accounts. Existing practice in the industry, with reference to such matters as interest on past due accounts, free goods, cartage, drayage, and so on are also studied.[6]

Collections.—A credit bureau may also be effectively used as a means of bringing the group pressure of the association to bear on a slow and delinquent debtor. A member may advise the customer of his intention to turn the account over to the credit bureau for collection and the bureau itself may supplement, if need be, such action by a letter without making further efforts toward collection. Some associations extend their activities to the active collection of overdue accounts. Among such associations are the National Warm Air Heating and Ventilating Association, the Wholesale Seedsman's League, the American Association of Nurserymen, the Knit Goods Manufacturers of America and the National Wholesale Lumber Dealers' Association. The advantages of such action are the strong moral effect upon delinquent debtors, often resulting in quick collections at little expense, and the payment of many small accounts which would not admit of usual collection charges. An association can usually make collections at less expense than would be

[6] Forty-fourth Annual Meeting, pp. 210-335. See also *Oil Paint and Drug Reporter,* Oct. 4, 1921, p. 2.

involved in the use of private agencies. The bureau of the knit goods manufacturers, for example, during its first year collected over $40,000 in delinquent accounts, at an expense of about 1.3 per cent.[7] There is, however, considerable objection in some associations to collection activities by an association agency, because of the fact that misunderstandings arising in connection with the handling of an account, not only antagonize the customers, but injure the association as well. Not only the customer may extend his ill-will to the other members of the association but also the member whose account was handled may himself also be dissatisfied with the method of handling.

Legality.—It is unlawful for an association to establish and maintain rules for the giving of credit to dealers which have the effect of restricting competition.[8] Competition in terms may be and sometimes unquestionably is as important a factor in trade as the price offered. No association can, therefore, safely adopt uniform rules as to the terms of credit to be granted buyers.

But on the other hand, associations are justified in taking reasonable fair action to protect themselves against delinquent debtors or dishonest dealers. In the Swift case cited above, the Supreme Court approved the provision of the injunction issued by the lower court, providing that nothing in that injunction should be construed as prohibiting the defendants from "establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers."[9] The right of persons to associate to protect their interests by discriminations against persons who fail to pay their bills due to members of the association is fairly well established, provided it is not coercive and arbitrary.[10] State courts have also been

[7] Report, Roy A. Cheney, Secy., Knit Goods Mfrs. of America, *Textile World*, May 21, 1921, p. 25.

[8] Decree, *United States vs Swift and Company.* Decree and Judgments in Federal Anti-Trust Cases, p. 64. See also Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922, Appendix J. See also p. 258.

[9] *Ibid.*, p. 65.

[10] *United States vs King*, 229 Fed. 275-278 (1915).

liberal in holding that lists of delinquent debtors, and even agreements not to sell on credit to delinquent debtors, adopted by an association in good faith to lessen credit risks, give no cause of action for damages to the buyer who suffers a loss of credit therefrom.[11] Ordinarily the buyer whose credit standing has been impaired cannot succeed in an action for libel. Proof of the truth of the statement is of course a complete defense and various courts hold that the common interests of members of an association render such credit statements qualifiedly privileged, the aggrieved party therefore being compelled to show, not only that the statement was false, but also that it was made with express malice.[12] There are, however, decisions which do not recognize such privilege,[13] and when the object is not merely to supply data to protect members from extending credit to such debtors, but rather to coerce the debtors into paying accounts overdue, such an activity is condemned.[14] The Federal Government in a recent petition under the Sherman Act, has charged as a violation of the law the action of an association's members in jointly agreeing not to sell to dealers delinquent in their accounts.[15] The only safe policy for an association to follow, under the existing state of the law, therefore is to enter into no agreements or implied understandings to re-

[11] For a detailed discussion of the law, see report of Joseph E. Davies, U. S. Commissioner of Corporations, on "Trust Laws and Unfair Competition," p. 732 ff.

[12] *Reynolds vs Plumbers' Material Protective Assn.*, 63 N. Y. Supp. 303 (1900); affirmed 169 N. Y. 614 (1902); *Trapp vs Dubois*, 78 N. Y. Supp. 505 (1902); *Weston vs Barnicoat*, 175 Mass. 454 (1900); *McIntyre vs Weinert*, 195 Pa. 52 (1900); *Ulery vs Chicago Live Stock Exchange*, 54 Ill., App. 233 (1894); *White vs Parks*, 93 Ga. 633 (1894).

[13] *Muetze vs Tuteur*, 77 Wis. 236 (1890); *Woodhouse vs Powles*, 43 Wash. 617 (1906); *Dennby vs Northwest Credit Assn.*, 55 Wash. 331 (1909); *Western Union Telegraph Co. vs Pritchett*, 108 Ga. 411 (1899); *Werner vs Vogell*, 10 Kans. App. 536 (1901); *Cleveland Retail Grocers' Assn. vs Exton*, 18 Ohio, Circuit Ct. 321 (1899); *Windisch-Mulhauser Brewing Co. vs Bacom*, 21 Ky. L. R. 928 (1899); *Nettles vs Somervell*, 6 Tex. Civ. App. 627 (1894).

[14] *Masters vs Lee*, 39 Neb. 574 (1894); *Heim Brewing Company vs Belinder*, 97 Missouri App. 64 (1902); *Martell vs White*, 185 Mass. 255.

[15] See petition, *United States vs Tile Mfrs'. Credit Assn. et al.*, January, 1922, p. 23.

fuse to deal with delinquent or irresponsible dealers, but merely to act as the medium through which the experiences of members are confidentially exchanged.

Under no circumstances should a credit bureau be used as a means of classifying the trade, or in any way whatsoever to restrict competition between the members or their customers, or the parties from whom they purchase. So-called credit bureaus of associations or private credit agencies indirectly, have repeatedly been used as indirect black lists or white lists to control the channels of distribution and prevent direct sales to consumers or others. There is no question that any such misuse of a credit agency is unlawful.[16] In one case an indictment has been returned against association members and convictions secured, one of the allegations of the indictment being the reporting of dealers to the credit bureau of the manufacturers' association for the purpose of preventing sales to such dealers.[17]

No association should organize or conduct a credit bureau, except with the counsel and under the supervision of an attorney who has a thorough knowledge of the laws of competition. In the operation of such a bureau, the following principles should be closely adhered to:

First, the association should act solely as the conduit for the exchange of experiences of its members. In other words, it should merely compile and distribute the naked facts without reporting any conclusion as to the responsibility or acts of the parties reported.

Second, the association should make no recommendation, either express or implied through its officers, or by consideration and findings by special committees, as to any action the members should take regarding parties concerning whom information is given.

[16] *United States vs Hollis et al.* (Northwestern Lumbermen's Assn.), 6 Fed. Anti-Trust Decisions 976, 990, 996 (1917). See also, consent decree, *United States vs Hartwick et al.* (Mich. Retail Lumber Dealers' Assn.). Decree and Judgments in Federal Anti-Trust Cases, pp. 649, 655, 658 ff.; *United States vs Colorado and Wyoming Lumber Dealers' Assn., ibid.*, 633, 668, 669 ff.

[17] *Indictment vs Belfi et al.* (Philadelphia Tile Mantel and Grate Assn.), Dec. 6, 1917, p. 6.

Third, information should be furnished in confidence to members only with proper safeguards, through a code system or otherwise to make any documents unintelligible to outside parties. This is to avoid even the possibility of libel suits against the association or members furnishing information.

Fourth, to assure fair, unbiased information, data furnished by one complainant should not be circularized, especially when the informant is obviously prejudiced or acting with malice. It is human nature for one party to a trade controversy to believe the other party is dishonest. Information secured from one source may, therefore, be unfair and unreliable. The circulation of such information defeats the whole purpose of a credit bureau, which is to furnish accurate information to the members. Either information reporting a buyer should not be given until a certain number of complaints have been made against him which appear to be supported by the files, or upon the receipt of a complaint, inquiry should be sent to the entire membership and a composite report giving the experience and judgment of the entire membership, without recommendation by the association officials should be compiled and furnished the members. A credit bureau thus conducted in a fair spirit, carefully protecting the rights of all parties, can be of great value in eliminating to a substantial degree the abuses of credit of which economists complain in condemnation of the competitive system of industry.

Patents.—The National Automobile Chamber of Commerce maintains a patent department, the primary purpose of which is to investigate charges of patent infringements brought against its members. Where suits threaten the common good of the industry the Association has taken over the defense of the suit. When patents are found to be valuable the Association has secured licenses for its members on a favorable basis.

One of the real achievements of trade association history is the plan of cross-licensing patents employed by this association for seven years.[18] Under this plan the more than 125 automobile manufacturers have entered into an agreement under which

[18] "How Automobile Men Are Banded Together," Alfred Reeves, General Manager, National Automobile Chamber of Commerce, *New York Evening Post*, March 27, 1922.

they interchange patent rights without payment of any money consideration. The purpose of this plan is to eliminate patent litigation, to develop a coöperative spirit in the industry, and to secure the production of better cars at lower costs. By making the engineering ability of the entire industry available to all members the standards of American automobiles are bettered. The confidence of the buying public the world over in the American product is thus maintained. The plan does not include basic patents involving very important inventions; such patents being exclusively within the control of the individual manufacturer. Nor does it embrace design patents, but it does include many important patents involving many parts of an automobile which though important to an industry are not of such an outstanding character that their common use by all members would deprive the individual manufacturer owning such patent of the competitive advantage to which he is entitled as the owner of a patent. Any company which has been in operation for a year or more and has a reputable standing is given the opportunity to join the Association, and participate in this arrangement. A single company putting in a few patents secures the benefit of licenses under about six hundred patents. By permitting members to retain the sole benefit of inventions radically affecting the industry, if they so desire, full encouragement is given to the continuation of research work by all companies in the industry. This plan, which is credited to the initiative and vision of Charles Clifton, President of the Pierce Arrow Motor Company, and C. C. Hanch, Vice-president of the Lexington Motor Company, is a constructive achievement, —an example of industrial statesmanship. By a mutual respect for the property rights of one another needless litigation is avoided, quality of product is greatly improved, and the progress of the industry immeasurably forwarded.

Trade-marks and Trade-names.—In a similar way some associations endeavor to prevent conflict of interests between their members and others as to trade-marks and trade-names. All members of such associations file with the bureau of the association all proposed trade-marks or trade-names they intend to use. It is easily possible for a manufacturer to adopt a trade-mark name, engage in a considerable advertising campaign to

establish his brand, only to find that some competitor has been using it for years. Under such circumstances there is a tendency for both parties to fight their rights out in the courts. An agency acting as a clearing house for the industry in such matters can often secure the withdrawal of a name or mark when its illegal use is merely contemplated, thus preventing not only a wasteful expenditure of money for labels, advertising, and so on, but also unnecessary ill-feeling. Among the associations maintaining such bureaus are the American Drug Manufacturers' Association, the Silk Association of America, and the National Paint, Oil and Varnish Association.[19]

The work of these bureaus has been most helpful. The Drug Manufacturers have found that one-third of the new trade-names submitted to their bureau were conflicting with those of competitors who had established prior rights to their use.[20] The Silk Manufacturers have also found their bureau of great assistance in preventing conflicting use in numerous instances.[21]

Only twenty-five per cent of the eight thousand marks and names on record in the trade-mark bureau of the paint manufacturers' association are recorded in the Patent Office in Washington, and the bureau, therefore, has been of great value, in enabling its membership to avoid unintentional infringement on the rights of others.[22]

Many trade-names which may not be technically registrable under the trade-mark laws are of great value, and no honest manufacturer desires to infringe upon them. The registration of such names with the association bureau protects manufacturers in the use of such trade-names, and may, of course, be of value in any litigation in establishing priority of use. The paint association has done valuable educational work among its members informing them as to the legal pitfalls to be avoided in the selection of a trade-mark, and the proper measures to take

[19] *Proceedings*, American Drug Mfrs'. Assn., 1921, p. 370; Forty-sixth Annual Report Silk Assn. of America, 1918, p. 39; Report of Trade Mark Committee, *Oil, Paint and Varnish Reporter*, Dec. 9, 1918, p. 27.

[20] *Proceedings*, Seventh Annual Convention, American Drug Mfrs'. Assn., 1918, p. 39.

[21] Forty-sixth Annual *Report*, Silk Assn. of America, 1918, p. 36.

[22] *Oil, Paint and Drug Reporter*, Dec. 9, 1918, p. 27.

to secure full protection. There can be no question of the legality of such helpful work as this.

Designs.—The Association of Dress Manufacturers has in a similar way created a style registration bureau.[23] This bureau sketches and records the original creations of its members as a means of protecting their rights. It is hoped that this agency will be of aid in eliminating the style pilfering prevalent in the industry. A bureau of this kind could be of considerable value in protecting its members from unfair competition in the form of imitative designs of articles or containers.

Insurance.—Some associations have found the organization and operation of insurance agencies not only a means of securing a reduction in rates, but also a valuable means of financing their organizations.[24]

The Paint Trade Mutual Fire Insurance Company is under the control of the Paint, Oil and Varnish Association. This company started without capital, now carries $5,000,000 of insurance in force, and during its first ten years has built up a surplus of over $50,000. The purpose behind its promotion was to lessen paint fire hazard and reduce insurance premiums by having rates fixed and risks rated by men who knew something about the industry. It has succeeded in reducing the hazards, and has cut down the rates in many places very substantially. This work is viewed by the association as one of its most successful coöperative achievements.[25]

The silk association due to an increase in transit liability insurance in 1918 formed a stock company under the name Textile Transit Insurance Company, the stock being taken by members of the association.[26] The purpose of this organization is to provide transit insurance at a rate determined by actual

[23] National Trade Associations: A Study by the National Assn. of Manufacturers, 1922, p. 33.

[24] The following associations handle insurance directly or in an advisory way: Silk Assn. of America, National Paint, Oil and Varnish Assn., National Assn. of Farm Equipment Mfrs., National Assn. of Sheet Metal Contractors, Associated General Contractors of America, Southern Pine Assn. and American Coat and Suit Mfrs'. Assn.

[25] *Report* of Fire Insurance Committee: Reports of Committees, Paint Mfrs'. Assn. of the U. S., Nov. 18, 1920, p. 13.

[26] *The Silk Worm*, February, 1921.

losses plus a minimum overhead. Statistics compiled by the association on losses occurring while shipments were en route proved that an immense saving can be made for the members of the association, who prior to the formation of this company were bearing the burden of undesirable risks. Various state hardware associations have also formed mutual fire insurance companies.[27] The Associated General Contractors of America have formed a corporation known as the Contractors' Service Corporation, all of the stock of which is owned by the association or its directors.[28] This corporation is licensed to act as a broker to handle insurance and bonding business. The dividends in the company in one year amounted to $4,500, although only a few of the members did business through the corporation. The insurance bonding committee of this association asserts that if the membership were to give the corporation ten per cent of their business the entire work of the association would be financed without the assessment of any dues. There are several associations who handle employers' liability insurance. Mutual insurance companies organized within an industry, even though maintained in a simple way may exert a very healthy influence in keeping down rates by reason of their competition.

Other associations deal with insurance in an advisory way only. The Refractories Manufacturers' Association has recently employed insurance experts to make a general survey of plants owned and operated by the members. The purpose of this survey will be to suggest improvements to members which will reduce fire hazards, to secure complete data as to the risks in order to present comprehensive information to the insurance rate bureau, in an effort to secure reduced rates, and also to study policies in order to secure the maximum of coverage for a minimum premium.[29] The Southern Pine Association, whose members pay out in insurance premiums annually over one and one-half million dollars has likewise established an insurance department in the association.[30] Extensive plans of saw mill

[27] *Proceedings*, National Assn. of Sheet Metal Contractors, 1914, p. 9.

[28] *Bulletin* of Associated General Contractors, February, 1921, p. 13.

[29] National Trade Assn.: A Study by the National Assn. of Mfrs., 1922, p. 55.

[30] *Ibid.*, p. 157.

properties have been prepared upon which fire insurance rates have been reduced. Policies of the members are examined to assure them proper protection, and the association has also represented its members in the adjustment of fire losses. The National Association of Farm Implement Manufacturers also retains insurance advisors to protect its membership in the placing of insurance.[31]

Work of this general character may be of great value. The Insurance Committee of the National Fertilizer Association report a saving in insurance premiums of over $40,000 on the rates of stock fire insurance companies for 26 members of the association through association handling of their insurance.[32]

Missing Property Bureaus.—Due to an alarming increase in silk thefts the silk industry was faced with the necessity of coöperative action to cope with the evil. The missing property bureau was therefore created.[33] Bulletins were sent to members advising them as to the precautions to be taken in making shipments, regular bulletins are issued in which are reported all goods reported missing, stolen or in the no-mark department of the common carriers, the publication of each item being repeated in each issue until located. Rewards are being offered for the prevention of thefts. Records of suspects and convicted thieves are being kept, express and freight terminals are being watched, and every effort is being made to make the stealing of silks a hazardous and unprofitable venture.[34]

The Vigilance Committee of the National Jewelers' Board of Trade has also worked out an efficient system of protection against theft.[35]

Other Activities.—The value of credit bureaus to the members of an association has already been discussed. Distributors of bulk commodities also often find themselves seriously embar-

[31] Letter, H. J. Samert, Secretary, April 27, 1922.

[32] *Proceeding*, Twenty-fifth Annual Meeting, 1918, p. 32.

[33] Forty-sixth Annual Meeting, Silk Assn. of America, 1918, p. 36.

[34] "Organizing Against the Silk Thief," C. P. Russell, *Printers' Ink*, Jan. 15, 1920 (vol. 110), p. 49.

[35] "Queer Trade Problems Manufacturers Are Unravelling Through Cooperation," C. H. Rohrbach and John Allen Murphy, *Printers' Ink*, Sept. 23, 1920, p. 76.

rassed by rejections of shipments. Some buyers of the unscrupulous type do not hesitate to take advantage of the seller who is located at a distant point and refuse shipments merely to secure a reduction in price. Demurrage, penalties, and other charges of the carriers compel the shipper to make a sacrifice or pay excessive storage charges. To protect their members the wholesale lumber dealers have investigated and reported to their members the storage yards throughout the United States which will store lumber at a reasonable charge.[36] To further protect its membership, this association, through its counsel, has made arrangements with attorneys in every important producing and distributing lumber center to handle the cases of its members.

Thus, in one way and another business men without losing their spirit of competition can work together in the protection of their rights. Such work stabilizes business conditions by eliminating unintentional imposition on the rights of others and by putting the whole force of an industry against those who would violate the law or the rules of business decency. Government itself is in considerable part founded on the idea of protection of property. Organized industry as it aids in the protecting of property rights of its members and others, supplements and makes more effective the protection which Government proposes to give to industry.

[36] *Bulletin,* American Wholesale Lumber Assn., Jan. 13, 1922.

CHAPTER XII

COMMERCIAL ARBITRATION

In every industry, there are many things constantly creating disputes and misunderstandings. The products of the industry may not be standardized with the result that the parties are not really agreed as to the subject matter of their transaction. The general practice in making sales in some industries in this country is so informal that important parts of the transaction are not even reduced to writing, which creates endless possibilities for misunderstanding. Trade terms may have a varied or indefinite meaning in different localities. The customs of a trade may be vague and uncertain, one party assuming the other party in making the contract has in mind a usage which the other party in fact in no way recognizes as existent. A buyer's market or a seller's market, as the case may be, may enable one party to force an unfair advantage even though his action violates the law applicable to the transaction. The cumulative effect of these and other facts sometimes creates a condition of extreme distrust between the producing and distributing branches of an industry, which is most harmful in its effects. In such a situation, the costly, tedious and provoking lawsuit is an irritant, rather than a remedy.

Development of Arbitration.—Centuries ago, the merchants in European countries sought to arbitrate their trade disputes through informal tribunals of their fellow tradesmen. The judges in those days, often dependent for their income on the volume of cases in their courts, did not look on such action with a generous or philanthropic spirit, seeing in it only what they felt to be an attempt to oust the courts of jurisdiction over such matters. By their decisions they attempted to restrict the use of arbitration. The precedents thus established in jealousy, have carried down through the common law to modern times, greatly hampering and delaying the development of the use of arbitration. But modern courts over-burdened with work

and our state legislatures have given great impetus to the movement for commercial arbitration. The American Bar Association is now giving serious consideration to the furtherance of federal and uniform state legislation, designed to greatly strengthen and encourage the use of arbitration generally.[1] Today the business men of America in a fine spirit of coöperation are rapidly building up a great quasi-judicial system for the settlement of trade differences, conducted by business men and supplementing our courts, the beneficial effects of which it is difficult to overemphasize. The trade association has been the medium utilized and indeed is the only practicable agency through which arbitration can be developed in a constructive, comprehensive way.

For many years in this country local organizations have operated arbitration systems. It is only recently, however, that the great national trade associations representing entire industries have begun to work out arbitration systems which are working efficiently and effectively. Some of our larger associations have adopted complete plans for arbitration; some of them provide for printed rules of procedure, fixed staffs of arbitrators and even published volumes of decisions to serve as guiding precedents for the industry.[2] The wholesale grocers and the brokers of canned goods and dried fruits have in successful operation a system of inter-associational arbitration.[3] Some twelve associations representing all the branches of the

[1] *Report* of Committee on Commerce, Trade and Commercial Law, American Bar Assn., 1921, p. 47 ff.

[2] Among the national trade associations which have adopted arbitration systems are the following: American Wholesale Lumber Assn., National Wholesale Grocers' Assn., Grain Dealers' National Assn., Rubber Assn. of America, Silk Assn. of America, Pacific Coast Shippers' Assn., National Wholesale Lumber Dealers' Assn., Interstate Cotton Seed Crushers' Assn., International Apple Shippers' Assn., National League of Commission Merchants, Linseed Assn., American Assn. of Nurserymen, American Cotton Waste Exchange, Southern Pine Assn., National Assn. of Worsted & Woolen Spinners, National Canned Goods & Dried Fruit Brokers' Assn., Knit Goods Mfrs. of America and the National Wholesale Dry Goods Assn.

[3] Rules & Regulations adopted by National Wholesale Grocers' Assn. and National Canned Goods & Dried Fruit Brokers' Assn.

lumber industry are now working out the details of a plan in which it is hoped manufacturers', wholesalers' and retailers' associations will participate.[4] The knit goods manufacturers and the wholesale dry goods dealers have adopted a uniform contract containing a clause, providing for arbitration of any disputes by an arbitration committee, consisting of one member appointed by the president of the manufacturers' association, one member appointed by the president of the wholesalers' association, and a third member selected by these two appointed.[5] The American Wholesale Lumber Association, the Grain Dealers' National Association, and the Interstate Cotton Seed Crushers' Association, have taken the revolutionary step of writing in their by-laws the requirement that every member must submit to arbitration any trade dispute he may have with a customer or person from whom he buys his goods. Could there be a better guarantee of the integrity of the membership of a trade association than this?

Benefits of Arbitration.—What is the value of an arbitration system as a part of the working organization of an industry? The resulting elimination in expenses and delays of legal proceeding, it is scarcely necessary to mention.[6] Still more important is the fact that the parties are guaranteed a decision by a committee of fellow business men thoroughly conversant with the technique and customs of the trade rather than by a jury of laymen totally unacquainted with the trade. Certainly a decision by one who knows the intricacies of the trade is apt to be more fair than the verdict of a weary jury.[7] But these results are the smaller results of arbitration. The spreading movement for arbitration has a large economic significance.

[4] *Southern Lumberman*, Dec. 17, 1921.

[5] *Textile World*, March 12, 1921, p. 24.

[6] *Report* of Charles L. Bernheimer, Chairman, Special Committee on Arbitration of the Chamber of Commerce of New York; see pamphlet, Commercial Arbitration, issued 1911, p. 31; Commercial Arbitration, Fred Larkin, Assistant Secretary, American Wholesale Lumber Assn., *Southern Lumberman*, Dec. 17, 1921; *Report*, Committee on Arbitration, Silk Assn. of America, Forty-sixth Annual Meeting, 1918, p. 31.

[7] Editorial, *American Lumberman*, Sept. 4, 1920; *Report*, Committee on Arbitration, Silk Association of America, Forty-sixth Annual Meeting, 1918, p. 31.

Arbitration strikes at the cause of many business disputes. Particularly in our great basic industries such as lumber and coal where the commodity is sold entirely in bulk, the product often is only partially standardized. Even though fairly well standardized, the different judgments of the buyer and the seller create dispute. Lack of standardization is a prolific cause of trade differences. Trade customs also are of slow growth, evolving out of myriads of transactions extending over long periods of time until they finally become so definitely established as to become an implied part of all contracts made. The arbitration decisions of arbitration committees composed of the leading business men of the industry can be of inestimable benefit in fixing more clearly the standards of the product and fixing more definitely what is the fair trade practice. If used as precedents to be followed by the industry, they can expedite greatly the firm establishment of the practice as a custom of the trade. Such decisions if published by the trade associations of the industry will more quickly, clearly and definitely establish the customs of the industry to its great benefit,[8] rather than allow them to evolve gradually as the offspring of endless disputes and lawsuits.

Arbitration tends also to strengthen the commercial standards of an industry.[9] There are many controversies constantly arising which because they do not involve big sums will never get into the courts. Some business men, if they can be called business men, prey upon that fact picking up in the aggregate considerable sums of money by forcing compromises on those with whom they deal. Their repeated success tends to lower the standards of commercial integrity. An arbitration system affording machinery for the settlement of these minor disputes which may involve big principles without compromise strengthens the position of those who do business honestly.

It need scarcely be pointed out that the removal of the causes of misunderstanding as well as the elimination of the

[8] Commercial Arbitration, Fred Larkin, Assistant Secretary, American Wholesale Lumber Assn., *Southern Lumberman*, Dec. 17, 1921.

[9] Pamphlet, Commercial Arbitration, issued by Committee on Arbitration of Chamber of Commerce of New York, 1911, p. 8; Editorial, *American Lumberman*, Sept. 4, 1920.

strains and irritations of lawsuits will make for a much better spirit in an industry.[10] The spirit of an industry is a substantial factor affecting its prosperity. Business men bitterly hostile to one another often indulge in unfair methods of competition which come near to producing business anarchy. A needless enmity between two competitors has more than once injured seriously an entire trade and worked ruin to competitors. A compulsory system of arbitration largely prevents such a possibility. The fact that arbitration machinery is ready for service, that arbitration is compulsory, results in the immediate reference of a dispute to arbitration before the controversy becomes acute. The business man who refuses to abide by the decision of his fellow business men condemns himself. Thus arbitration becomes a conserver of good will and a preserver of prosperity.

The fact that a seller agrees to arbitrate any and all disputes wins business for him. Trade associations whose members have adopted compulsory arbitration have found this one of its most valuable features.[11] The buyer feels that in the event of any misunderstanding or possible mistake in delivery, his rights will not be determined by the seller on the basis of his size or desirability as a future customer, but will be guaranteed by the fair decision of impartial business men. The seller oftentimes located far from the point of delivery is in equal measure protected. Arbitration guarantees the integrity of the transaction and immediately makes the party employing it a desirable person with whom to do business. British business men have long recognized this fact and the arbitration clause comes near to being a standard feature of British contracts. In foreign trade particularly where the opportunities for sharp practices are enlarged, the need for arbitration machinery is great. To supply this need, the Chamber of Commerce of the United States is entering into arrangements for arbitration with various com-

10 Pamphlet, Commercial Arbitration, issued by Committee on Arbitration of the Chamber of Commerce of New York, 1911, p. 8; Letter, G. Gash, Vice-president, American Cotton Oil Company, June 1, 1920. Foreword, Decisions of Board of Arbitration of Pacific Coast Shippers' Association.

11 Commercial Arbitration, Fred Larkin, Assistant Secretary, American Wholesale Lumber Assn., *Southern Lumberman*, Dec. 17, 1921.

mercial organizations in South America.[12] The great International Chamber of Commerce has in its by-laws a provision for arbitration of commercial disputes.[13] This organization is urging the adoption of laws in all countries which would make valid the awards of foreign arbitration committees regardless of nationality. The Department of Commerce is coöperating with trade associations in an effort to encourage the general use of arbitration. At the Washington Commercial Arbitration Conference, held in Washington November 15, 1919, resolutions were adopted, urging the Secretary of State to negotiate treaties with foreign countries, providing that arbitration agreements in commercial contracts shall be valid, enforceable and irrevocable, and that provision be made for reciprocal enforcement of such agreements by the courts of the respective countries making such treaties.

Here surely is a splendid field for the activity of every trade association, based entirely on a spirit of coöperation yet making in every way for the business welfare and the good of American industry.

The Organization of an Arbitration System.—An association adopting a plan of arbitration must first determine on the basic nature of its system, which will depend on three factors. First, it must decide whether arbitration so far as its members are concerned, shall be voluntary or compulsory. Second, it must determine whether its system of arbitration shall be informal, depending on moral suasion for its efficient operation or whether it shall be more formal in character, relying upon procedure in the courts if necessary for enforcement of awards made. Third, it should be determined whether the arbitrators should render their decisions solely on their judgment as to equities of the situation or whether they should recognize in their decisions the established principles of law.

Voluntary arbitration for most associations is the only

[12] See, for example, pamphlet, Arbitration for Disputes in Trade between the United States and the Argentine Republic. Chamber of Commerce of the United States, September, 1919.

[13] Constitution & Rules, International Chamber of Commerce, adopted at Paris, June, 1920, Art. VII, Sec. 12.

method to employ in beginning the use of arbitration.[14] Most members will naturally be very cautious about agreeing to submit all disputes to arbitration until they see for themselves its application in their industry. The defect of voluntary arbitration is that many men will arbitrate only those disputes which they feel certain of winning. The type of disputes involving trade usages, contract methods and so on, the arbitration of which is most beneficial to the industry, will not be submitted. Compulsory arbitration on the other hand gives tone and prestige to the organization, and wins for the members the confidence and respect of the trade.[15] It is an advertisement of the quality of the membership. In operation it tends much more effectively to secure the benefits of arbitration already described.

The advantages of informal arbitration are, of course, its simplicity and informality which possibly tends to better feeling and lessens expense. The weakness of too informal a system lies in the fact that the enforcement of an award becomes difficult and often impossible, especially when dealing with non-members. On the other hand, too formal arbitration can readily become a complicated system of red tape which does not make for quick action and tends to make members suspicious of the benefits of arbitration. There have been enacted by a number of states statutes strengthening arbitration and providing different remedies for the enforcement of awards.

Under existing conditions, there are two general systems of law governing commercial arbitration. First, the old common law, which unless specifically abrogated by statute, still exists, and secondly, the statutory law of the several states which often makes arbitration clauses irrevocable and provides new remedies. To take advantage of these remedies, however, the provisions of the statutes must be strictly complied with. For an association having a membership extending over many states, it is almost impossible without involving too many technical re-

[14] The writer has been able to find only three national associations which maintain compulsory systems—the American Wholesale Lumber Assn., the Grain Dealers' National Assn. and the Interstate Cotton Seed Crushers' Assn. The operation of these three systems has been highly successful.

[15] Commercial Arbitration, Fred Larkin, Asistant Secretary, American Wholesale Lumber Assn., Dec. 17, 1921.

quirements, to formulate a system which will comply with the many formal provisions of state statutes. Under the circumstances it would appear best for the large association to adopt a system of common law arbitration clearly establishing the rights of the parties by the use of proper written documents so that a clear cut record can be presented to the courts, if necessary for the enforcement of any award made. Under such a system, non-members participating are bound by the awards. It has enough of formality so that unambiguous records are made and decisions are rendered in such a way that they are helpful to the entire industry.

It is entirely within the option of an association adopting a system of arbitration whether the decision of the committee shall be based upon what the committee feels to be the equities of the situation between the parties or whether they shall also consider basic legal principles. Unless there is a restriction in the agreement of the parties submitting the case to arbitration, arbitrators have the power to decide both questions of law and fact,[16] and the award of arbitrators is binding even though contrary to law.[17] Most associations permit their committees to decide the case without reference to the law. Some, however, especially under a compulsory system require that the legal rights of the parties be protected. The American Wholesale Lumber Association, for example, before referring the files of a case to the arbitration committee, first refer them to their counsel, a former chairman of the Federal Trade Commission, who prepares a statement of the law applicable, very similar in form to the charge of a court to the jury.[18] The committee then applies the facts to the principle. A similar method is employed by the Pacific Coast Shippers' Association, the Southern Pine Association and the International Apple Shippers' Association.[19] An arbitration system taking into consideration legal principles has substantial advantages. It is only right

[16] *Kleine vs Catara*, 14 Fed. Cases 7869, 2 Gall. 61.

[17] *Smith vs Smith*, 4 Rand (25 Va.) 95, 101.

[18] Commercial Arbitration, Fred Larkin, Assistant Secretary, American Wholesale Lumber Assn., *Southern Lumberman*, Dec. 17, 1921.

[19] Fourth Annual Meeting, Southern Pine Assn., 1918, p. 44; Letter, R. G. Phillips, Secretary International Apple Shippers' Assn., Oct. 25, 1920.

that any man who bases his transaction upon the established rules of society should be protected as to such rights particularly when substantial sums are involved in an arbitration proceeding. After all, it is not the basic principles of the law which in the last analysis represent the accumulated wisdom of centuries of experience arising out of a multitude of transactions but rather the procedure of the law with its endless technicalities, delays and legal difficulties which arouse the resentment of business men. An arbitration system that fails to take account of legal principles has nothing to tie to. Its decisions will be inconsistent and cannot be guiding precedents for the industry. If arbitration is going to supplement our judicial system, if it is going to aid in the more clear formation of trade usages and business practices, it must tie itself in some way to the great body of commercial law which is the development of centuries. To secure the greatest benefit from arbitration, therefore, any system adopted by an association, particularly when the system is a compulsory one, should require the consideration of the established principles of law.

Procedure.—The procedure followed in handling arbitration cases by the various associations varies from the utmost informality to careful procedure designed to make the plan legally binding in every respect. Some associations endeavor to make their procedure as informal as possible as they have found that very few men will refuse to comply with an award when rendered. Other associations have drawn their arbitration plans very carefully, with printed forms covering all steps of the procedure. The general plan of procedure should be shaped at least in a general way with the following considerations in view:

Arbitrators.—The general rule of law is that arbitrators must be appointed by or with the consent of the parties to the arbitration. In a common law arbitration the parties may provide in the submission (*i.e.*, agreement to arbitrate) for the selection of the arbitrators in any manner they see fit. Under the plan of the Linseed Association, each member selects one arbitrator, who select a third to act as referee in case of disagreement.[20] The International Apple Shippers' Association

[20] Constitution, Linseed Assn., 1918, Art. X.

have a regular standing committee for handling their cases.[21] The American Association of Nurserymen also employed this method.[22] Other associations have standing committees throughout the country appointed from different districts, or from different branches of the industry so as to secure expeditious action. The National Wholesale Grocers' Association has its committee appointed by districts. The Silk Association of America has a standing committee on arbitration and an official list of arbitrators selected from all branches of the industry, the arbitrators being notified of their selection by the secretary so that they will not know by which party they were selected.[23] The Interstate Cotton Seed Crushers' Association maintains standing committees of five members in a number of cities.[24] The National League of Commission Merchants of the United States have local arbitration committees in their branch organization with a right of appeal to the National Arbitration Committee.[25] The Grain Dealers' National Association have national committees of three members, appointed by the President and confirmed by the Board of Directors, consisting of one receiver or buyer in a central market, one representative country shipper and one grain dealer, not exclusively identified with either of these two branches of the grain trade. These committees act as appeal boards from the arbitration committee of the local associations.[26] Arbitrators under the system of the Rubber Association of America are appointed by the committee on arbitration of the association, subject to objection by the parties within two days after receipt of notice of such appointment. The Secretary of the American Wholesale Lumber Association appoints the arbitrators for disputes between its members, but where the dispute is between a member and non-member two arbitrators are chosen from that association and two others from the association of which the other party is a member, and

[21] Letter, R. G. Phillips, Secretary, Oct. 25, 1920.

[22] *Official Proceedings*, 1918, p. 99.

[23] Forty-sixth Annual *Report* Silk Assn. of America, 1916, p. 32.

[24] Rules governing transaction in cottonseed, etc., 1919, p. 58; *Proceedings*, Twentieth Annual Session, p. 147 ff.

[25] Constitution and By-laws, p. 18.

[26] Arbitration Rules Grain Dealers' National Assn., 1920, Art. II.

these arbitrators in turn select a fifth member of the committee.

In the absence of statutory prohibitions any person may be appointed an arbitrator by the parties to the arbitration, regardless of his natural or legal disabilities.[28] Arbitrators, however, should be selected with care for awards obtained under certain conditions may be voided. It is essential that the arbitrators should be impartial. They occupy a quasi-judicial position and if there are facts establishing bias on their part, they become incompetent to make a good award if such facts were not known to the party affected thereby.[29] An arbitrator is not the agent of the party appointing him, but rather the representative of both to render equal and impartial justice.[30] He should not, therefore, be interested in the subject matter to such a degree as to raise a reasonable belief that his interest would influence his decision.[31] Close relationship by blood or marriage if unknown to the other party, is likewise objectionable.[32] If the business relationships between the arbitrator and one of the parties is such as would naturally influence the judgment of the arbitrator, such relationship may also disqualify him from acting.[33] The fact that an arbitrator has prior to the arbitration formed and expressed his opinion upon the subject matter, may also be a ground for invalidating the award.[34] If, however, a party having a knowledge of the facts which would probably influence the judgment of an arbitrator but with such knowledge of these facts, submits his case, he thereby waives the objection.[35]

Submission.—There must be an agreement in some form to submit the dispute to arbitration before there can be a valid

[28] *Evans vs Ives*, 15 Philadelphia, Penn. 635.

[29] *Silver vs Connecticut River Lbr. Co.*, 40 Fed. 192, 194; *Duvall vs Sulzner*, 155 Fed. 910, 918.

[30] *Benjamin vs United States*, 29 Ct. Cl. 417.

[31] *Strong vs Strong*, 12 Cush. Mass. 135; *Monongahela Navigation Co. vs Fenlon*, 4 Watts and S. 205.

[32] *Poole vs Hennesy*, 39 Iowa 192, 18 Amer. Rep. 44.

[33] *Bradshaw vs Watertown Agriculture Co.*, 16 N. Y. S. 639, 137 N. Y. 137, 32 N. E. 1055.

[34] *Taber vs Jenny*, 23 Fed. Cases 13, 720, 1 Sprague 315.

[35] *Duvall vs Sulzner*, 155 Fed. 910, 918.

award.[36] At common law a verbal agreement of submission is probably valid when a verbal agreement between the parties in the terms of the award would be likewise valid.[37] Yet it is preferable from a standpoint of a clean record to have an agreement in writing. It is an essential part of the arbitration proceedings limiting and controlling the award, and it is in every way preferable, to have it in the form of a written document, to prevent misunderstandings and disputes over what was in fact submitted for arbitration. The American Wholesale Lumber Association merely secures the agreement of the parties to arbitrate by correspondence with each of them. The International Apple Shippers' Association uses no form of agreement, but requires that an agreement be drawn up in each case.[38] The Rubber Association of America, the National Wholesale Grocers' Association, the Interstate Cotton Seed Crushers' Association and the Silk Association of America, all have regular printed forms of submission agreements. Such an agreement should be acknowledged, the authority of the agent, partners, or official of the corporation, as the case may be, being clearly shown.[39] The submittal should also cover any and all matters which are to be arbitrated so clearly and specifically that there can be no doubt in the minds of the arbitrators as to the subject matter with which they are to deal. It need not be described in a technical way, such as prevails in law pleadings, but it should be stated clearly and unambiguously.[40] It should also designate the parties to the dispute,[41] and the time and place of hearing unless the selection of the time and place is left to the arbitrators.[42]

Hearing.—The submission having been executed and the arbitrators named, the case should then proceed to hearing. It is

[36] *The Glencairn,* 78 Fed. 379, 383, *Cherokee Nation vs United States,* 40 Ct. Cl. 252.

[37] *Harrison vs Wright,* 13 M. & W. 816.

[38] Letter, R. S. Phillips, Secretary, Oct. 25, 1920.

[39] *Buchanan vs Curry,* 19 Johns N. Y. 137, 10 Am. Dec. 200, 30 Am. Dec. 627 note; *Marville vs American Tract Society,* 123 (Mass.) 129, 25 Am. Rep. 40, 31 Am. Dec. 630.

[40] *Caldwell vs Dickinson,* 13 Gray (Mass.) 365.

[41] *Wesson vs Newton,* 10 Cush. (Mass.) 114.

[42] *Weir vs West,* 27 Kan. 650.

within the discretion of the arbitrators to determine their mode of conducting the proceedings, except of course with the limitation that they must be conducted honestly and fairly.[43] Each party to the arbitration is entitled to a hearing before the arbitrators.[44] The parties may, however, waive their right to a hearing by express agreement or in the submission.[45] The Silk Association of America holds regular meetings at which witnesses appear and give testimony.[46] Under the rules of the commission merchants, arguments and testimony may be submitted either in writing or orally, but both parties must follow the same method.[47] The Rubber Association of America also hold hearings at which the parties are entitled to be heard either in person or by counsel.[48] The Apple Shippers have no oral hearings, except when the case is particularly difficult and the parties desire it.[49] The rules of the Cotton Seed Crushers provide there shall be no personal appearance, except at the request of the Chairman, in which event both parties are entitled to appear. In the event one party submits papers while the other fails to do so, it is provided that the hearing may be ex parte.[50] The American Wholesale Lumber Association does not hold oral hearings unless they are requested by the committee.

Arbitrators are not bound to hear the argument of the parties,[51] or to allow representation by counsel.[52] It constitutes misconduct on the part of the arbitrators, however, to permit

[43] *Carlston vs St. Paul F. & M. Ins. Co.*, 37 Mont. 118, 94 Pac. 756.

[44] *Lutz vs Linthicum*, 8 Pet. 165; *Continental Ins. Co. vs Garrett*, 125 Fed. 589, 592; *Warren vs Tinsley*, 53 Fed. 689, 693.

[45] *Canfield vs Watertown Fire Ins. Co.*, 55 Wis. 419; *Amos vs Buck*, 75 Iowa 651, 37 N. W. 118.

[46] Rules Arbitration Silk Assn. of America, p. 5.

[47] Constitution and By-laws, National League of Commission Merchants, p. 19.

[48] Rules and Regulations, Rubber Assn. of America, approved, June 5, 1918.

[49] Letter, R. G. Phillips, Secretary, International Apple Shippers' Assn., Oct. 25, 1920.

[50] Rules governing transactions in cotton seed, etc., Interstate Cotton Seed Crushers' Assn., 1919, p. 58.

[51] *Zell vs Johnston*, 76 N. C. 302.

[52] *Stone vs Baldwin*, 226 Ill. 338, 80 N. E. 890.

one party to be represented by counsel and to refuse the other party a similar opportunity.[53] If the time and place of hearing are not fixed by submission, the arbitrators should appoint such time and place, giving the parties a reasonable time in which to secure their evidence and present their case.[54] The length of time they will wait to enable the parties to secure evidence is very largely within the discretion of the arbitrators.[55] Unless the parties have waived notice or agreed to dispense with it, failure of the arbitrators to give notice of the hearing will invalidate the award, except in a situation where the arbitrators were selected as experts to adjudge the dispute from their own knowledge.[56] It is of course improper to hear one party and his witnesses without notice to the other party.[57] The parties have no right to notice of or to be present at the meetings of the arbitrators for determining their decision as to the award after the evidence has been presented.[58] This is because the arbitrators should be able to deliberate in a fair and unbiased manner as to what the award should be.[59] In a common law arbitration, it is not necessary to swear the witnesses unless it is required by the provisions of the submission.[60]

The arbitrators are not bound by the strict rules of evidence and the fact that they admit incompetent testimony will not invalidate an award.[61] They may limit the number of witnesses to be examined, provided this power is not exercised in such a way as to prevent an impartial hearing.[62] They should not consult with or hear the attorney of one party in the absence of

[53] Matter of Picker, 130 App. Div. 88, 114 N. Y. S. 289.

[54] *Morewood vs Jewett*, 25 N. Y. S. 496.

[55] *Ginder vs Curtis*, 14 C. B. N. S. 723, 108 E. C. L. 723, 143 Reprint 628.

[56] *Lutz vs Linthicum*, 8 Pet. 165, 8 L. ed. 904; *Continental Ins. Co. vs Garrett*, 125 Fed. 589, 592; *Warren vs Tinsley*, 53 Fed. 689.

[57] *Oswold vs Grey*, 24, L. J. Q. B. 69.

[58] *Ormsby vs Bakewell*, 7 Ohio 98.

[59] *Roleson vs Carson*, 8 Md. 208, 222.

[60] *Newcomb vs Wood*, 97 U. S. 581, 24 L. ed. 1085; *Tobey vs Bristol County*, 23 Fed. Cases 14065.

[61] *Maynard vs Frederick*, 7 Cush. 247; *Velie vs Troy, etc., R. Co.*, 21 Barb. 381; *Burchell vs Marsh*, 17 How. (U. S.) 344.

[62] *Sizer vs Burt*, 4 Den. (N. Y.) 426.

the other party or his attorney.[63] Arbitrators may seek the advice of outside parties in order to more thoroughly understand the subject matter and to more efficiently perform their duty, although they should exercise their own individual judgment and not accept such advice as conclusive, unless it accords with their own viewpoint.[64] They may also employ other parties to perform ministerial duties in conducting the arbitration and may thus employ clerks, accountants or attorneys to draw up the award and so on.[65]

The Award.—In the absence of statutory provisions, there is no particular form which must be observed in making the award. It should be a complete and final settlement of the matter arbitrated.[66] If the submission agreement contains any special requirements as to the action of the arbitrators in making the award, these must be strictly complied with or the award will be of no effect.[67] It is not essential that the award be in writing, unless so required by the submission or the rules of the association.[68] Unless required by the terms of the submission, or by statute, the award need not contain recitals as to the subject matter submitted or that the arbitrators were duly appointed, or the parties duly heard, because such matters are not proved by mere recitals.[69] It is not necessary for the arbitrators to assign reasons for their award.[70] It may be undesirable for them to do so because such statements may be made a basis for attempts to invalidate the award on the ground of mistake, although a mistake to invalidate an award must be gross.[71] They need not set out the evidence as this places a burdensome task

[63] *Hewitt vs Reed City*, 124 Mich. 6, 82 N. W. 616, 50 L. R. A. 128.

[64] *Burchell vs Marsh*, 17 How. 344, 351; *Simons vs Mills*, 80 Cal. 118, 22 Pac. 25.

[65] *Choctaw Nation vs United States*, 119 U. S. 1, 97; *Steere vs Brownell*, 115 Ill. 415.

[66] *Spear vs Hooper*, 22 Pick. (Mass.) 144.

[67] *Allen vs Galpin*, 9 Barb. N. Y. 246.

[68] *Murdock vs Blusdell*, 106 Mass. 370; *Osgood vs Poole*, 165 Ill. A. 63; *Phelps vs Dolan*, 75 Ill. 90; *McNulty vs Solley*, 95 N. Y. 242.

[69] *Houghton vs Burroughs*, 18 N. H. 499, 502.

[70] *Patton vs Baird*, 42 N. C. 255, 260; *Hecker vs Fowler*, 2 Wall. (U. S.) 127.

[71] *Burchell vs Marsh*, 17 How. 344, 350.

upon the arbitrators, which is unreasonable to ask of a business man.[72] If the submission, however, requires the arbitrators to make separate findings of fact they must do so,[73] and where the character of the matters submitted themselves make necessary separate findings they should be made in the award.[74]

If the award is in writing, it is preferable to have it signed by the arbitrators. If a majority of the arbitrators are authorized to make an award, the arbitrators not consenting to the award need not sign it.[75] It is not within the power of an arbitrator to authorize another to sign the award for him in his absence.[76] An award may be signed by the arbitrators, however, at any time up to the time fixed by statute or by submission agreement for completion of the award.[77] In the absence of such provision, the authority of the arbitrators remains in effect until revoked by the parties.[78]

The award must not go beyond the subject matter of the submission agreement.[79] The courts, however, are liberal in construing the terms of an award as being in conformity with the submission and if the arbitrators, after reciting the terms of their authority set forth in the agreement of submission, recite that they make the award "of and concerning the said premises," they limit the award, in practical effect, to the scope of the submission.[80] Where the submission is not general, that is including, for example, "all matters in dispute between the parties," but is a special submission limiting the arbitration to particular matters, the award must be strictly limited to such matters.[81] If the arbitrators go beyond the terms of the sub-

[72] *Allen vs Smith,* 4 Del. 234.

[73] *Whitworth vs Hulse,* L. R. 1 Exch. 251.

[74] *Houston vs Pollard,* 9 Metc. (Mass.) 164.

[75] *Security Live Stock Ins. Assn. vs Briggs,* 22 Ill. A 107.

[76] *State vs Gurnee,* 14 Kans. 111.

[77] *Saunders vs Heaton,* 12 Ind. 20.

[78] *Wilkinson vs Pritchard,* 145 Ia. 65, 123 N. W. 964.

[79] *Republic of Colombia vs Cauca Co.,* 190 U. S. 524; *McCormick vs Gray,* 13 How. 26; *Rucker vs Page,* 69 Ill. 179.

[80] *Harrison vs Lay,* 13 C. B. N. S. 528, 106 E. C. L. 528, 143 Reprint 209.

[81] *Tucker vs Page,* 69 Ill. 179; *Masury vs Whiton,* 2 Silv. A (N. Y.) 123, 18 N. E. 638.

mission and it is possible to divide the award, it will be sustained as to the matters which were within the submission.[82] Thus it is probably advisable in making an award of a gross sum to itemize the items making up such sum so that it may be divisible in the event some items are not covered by the submittal agreement.

Where the arbitration involves the fixing of amounts of money due, the arbitrators may give a reasonable time for payment and they may also direct the payment of interest on the amount awarded until payment is made.[83]

As one purpose underlying arbitration is prompt settlement, an award cannot be good unless it is final in its terms.[84] In other words, it must so dispose of the subject matter in dispute that nothing remains to fix definitely the rights and obligations of the parties. It may, however, be conditional, *i.e.*, require one party to perform certain conditions before being entitled to the benefit of the award,[85] or it may be alternative to the extent of giving to a party an option of discharging of his liability in one of two ways.[86]

The award should be stated in such clear language that there should be no doubt as to what each party is required to do under it. If this were not so, awards would merely become grounds for new controversies.[87] Where the arbitrators are supposed to ascertain a definite sum but fail to fix such amount, leaving that part of the controversy uncertain and failing also to furnish data in their award from which the amount can be computed, the award is void.[88] The arbitrators must also decide all the items covered by the submission which are not withdrawn from their consideration by consent of the parties; and if they fail to do so, they invalidate the award. To sustain an award only partly good, would be in effect making and enforcing a

82 *Warner vs Collins*, 135 Mass. 26; *Doke vs James*, 4 N. Y. 568.

83 *Noyes vs McLaflin*, 62 Ill. 474.

84 *Boyd vs Bargagloitti*, 12 Cal. A 228, 107 Pac. 150.

85 *Brown vs Evans*, 6 Allen (Mass.) 333.

86 *Thornton vs Carson*, 7 Cranch. 596, 3 L. ed. 451.

87 *Lutz vs Linthicum*, 8 Pet. 165, 8 L. ed. 904; *Kingston vs Kingston*, 14 Fed. Cases 7821.

88 *Alexander vs McNear*, 28 Fed. 403, 405.

contract the parties did not make. When they agreed to arbitration, it was to secure a complete and final settlement.[89]

The awards of the Silk Association of America and the Rubber Association of America are very carefully drawn up in written form so as to comply with these requirements.

Appeal.—Some associations provide in their rules for appeal from the decision of the first arbitration committee. The American Wholesale Lumber Association allows appeals only when the decision of the original committee is not unanimous, the case then going to the general arbitration committee of the association for final decision. The Rubber Association of America allows appeals within five days from receipt of the notice of award, upon payment of $100, the case going to the general arbitration committee of the association.[90] The grain dealers allow appeal to what is known as the appeals committee, consisting of five members of the Board of Directors, appointed by the President. The American Cotton Waste Exchange has a standing arbitration committee for appeals, the Chairman of which sits on each case. The Chairman of the original committee also participates in the hearing on appeal, which must be made within three days after the receipt of the original decision, and must be accompanied by a check for $200.[91] Under the rules of the cotton seed crushers, appeals may be made within ten days if the award is over $300, providing the full amount of the award, plus the amount of $250 to cover the expenses of appeal and the traveling expenses of the committee are deposited.[92] If the award is not a money award, the President determines the sum to be deposited.

The associations which have the most successful arbitration systems usually have very carefully drawn rules and regulations standardizing the methods of handling arbitration cases. This

[89] *Carnochan vs Christie*, 11 Wheat 446, 6 L. ed. 516; *Palatine Ins. Co. Ltd. vs O'Brien*, 152 Fed. 922; *Continental Ins. Co. vs Garrett*, 125 Fed. 589, 591.

[90] Rules and Regulations, Rubber Assn. of America, approved June 5, 1918.

[91] *Textile World*, March 5, 1921, p. 97.

[92] Rules governing transactions in Cotton Seed, etc., Interstate Cotton Seed Crushers' Assn., 1919, p. 60.

is highly desirable as it prevents endless complications. The Silk Association of America, the Rubber Association of America, and the Grain Dealers' National Association, all have printed rules and regulations. The American Wholesale Lumber Association also has adopted regular rules. The Chamber of Commerce of the State of New York also issues a handbook of instructions to its arbitrators, advising them fully as to their duties as well as the procedure to be followed.[93]

Enforcement.—If the arbitration system of the association is framed along the lines required by law, the party winning an arbitration proceeding can successfully maintain action thereon in the courts. It is rare, however, that any such action is necessary as few business men would advertise themselves to the members of their association as refusing to abide by a decision of their fellow business men. The National League of Commission Merchants of the United States, the Interstate Cotton Seed Crushers' Association, the International Apple Shippers' Association, the American Wholesale Lumber Association and the Grain Dealers' National Association, all provide that any member refusing to abide by an arbitration decision shall be expelled from the association.[94]

Legality.—There can be no question as to the legal propriety of arbitration as such. Of course such matters as are tabooed by the anti-trust acts cannot lawfully be arbitrated for the law will not permit its purpose to be defeated by any subterfuge. Therefore, no questions such as the ethics of direct selling, price cutting, encroachments on competitors' territory, or any dispute, an adjudication of which if followed in the trade would restrict competition should be submitted to arbitration.

[93] Commercial Arbitration, pamphlet issued by Committee on Arbitration, Chamber of Commerce of the State of New York, p. 47.

[94] Constitution and By-laws, National League of Commission Merchants of United States, p. 18; Rules governing transactions in Cotton Seed, etc., Interstate Cotton Seed Crushers' Assn., 1919, p. 62; Letter, R. G. Phillips, Secretary, International Apple Shippers' Assn., Oct. 25, 1920; Plan of Arbitration of American Wholesale Lumber Assn., adopted June 30, 1920, paragraph 8; Arbitration Rules, Grain Dealers' National Assn., 1920, Article VI, Section 17.

CHAPTER XIII

SPEEDING UP DISTRIBUTION

There is a nationwide demand for an improvement in our methods of distribution. During the past half century, the cost of distributing commodities has greatly increased while the cost of production has decreased. A considerable portion of this increased cost is due to the higher standards of living of our people and their demand for special services, and uniform quality which cannot be supplied except at added expense. Part of this criticism is also due to an amazing lack of knowledge of the functions which distributors, particularly the wholesalers, perform. But few business men, whether they be manufacturers or distributors, will deny that there is room for improvement in the distribution of goods to the ultimate consumer. While efficiency in distribution must in the last analysis result from the individual efforts of distributors to improve their methods, yet in many ways organized effort through trade associations can accomplish substantial benefits where the individual would be wholly unable to attain results. The importance of coöperative advertising, of standardization, of united effort in transportation matters, of joint agencies for protection against bad debtors, of the elimination of unfair practices, and of commercial arbitration in enlarging distribution and reducing its costs, its irritations, and its wastes has already been discussed in preceding chapters. In other ways the trade association of an industry can aid in speeding up the movement of goods to the consumer.

Uniform Trading Rules.—In the older industries, trading is largely conducted under customs which have been developed and fixed as a result of centuries of usage. In many of our younger industries, there has not been time for trade customs to develop. As a result there is the utmost confusion in the transaction of business. Trade terms have varying meanings. There is no procedure to be followed in buying or selling. In-

evitably endless disputes and constant litigation results. The door is opened wide to sharp practices and dishonesty. The processes of distribution are made more complicated and the quick movement of commodities retarded. The various exchanges of our great cities long ago formulated rules which in no way impinge upon the public interests. There is a great opportunity in many industries for the formulation of similar rules in a national way. Some associations have carefully done this. The grain dealers for seventeen years have been operating under uniform trade rules.[1] These rules define the meaning of the customary trade terms, and establish the practice with reference to confirmation, time of shipment and delivery, billing instructions, incomplete shipments or deliveries, demurrage, sampling, loading minimums, acceptances, methods of handling bills of lading, overdrafts, weights, inspection, routing, arbitration and so on. The cotton seed crushers have also adopted very complete rules to apply in all transactions, in the absence of any special contract to the contrary.[2] The Rubber Association of America has adopted similar rules.[3] The American Lumber Congress, an organization composed of representatives of the manufacturing, wholesaling and retailing branches of the industry several years ago adopted limited trading rules which are receiving a widening application. Rules of this character generally used in an industry greatly simplify trading and make for a quicker distribution of its products. Trade rules, however, should not be drawn without advice of counsel. If they are employed to unreasonably restrict competition they are unlawful. But reasonable rules designed to expedite business are lawful.[4]

Uniform Contracts.—The laxity of the methods used in some industries in making purchases and sales is amazing. Only the honesty of the overwhelming percentage of business men makes business possible under such conditions. But the failure

[1] Trade Rules of the Grain Dealers' National Assn.

[2] Rules Governing Transactions in Cotton Seed and its Products as adopted by Interstate Cotton Seed Crushers' Assn., Thirty-third Annual Session, 1919.

[3] Rules and Regulations to Govern Transactions between Buyers and Sellers of Crude Rubber in the United States and Canada, 1917.

[4] *Board of Trade of Chicago vs United States,* 246 U. S. 231 (1917).

to incorporate clearly the complete terms of the supposed contract in the correspondence between the parties in innumerable cases results in disputes and lawsuits. There are endless opportunities for trouble when there is no clear written understanding as to such matters as liability for loss, or increased freight charges, or damage in transit or shrinkage, or such matters as routings, time for notification of claims or rejections, methods of inspection, arbitration, place of delivery, insurance, pure food guarantees, contingencies, right of cancellation and what not. When every buyer adopts his own order form, with many conditions printed on its back, and every seller adopts an individual form of acceptance containing numerous conditions, the situation is nearly as bad as though there were no contracts used. Many disputes will arise because of honest misunderstandings. And of course the door is left wide open for the dishonest trader who thrives on technicalities.

An examination of many transactions will disclose that a large percentage of what business men think are contracts are not completed contracts but merely incomplete negotiations. Associations, therefore, have directed considerable attention to the formulation of ideal contracts under which their members can do business.[5] There are substantial benefits to be derived from such action. If there is a standard form of contract in use, court decisions will in the course of time clarify each clause and its interrelation with the entire contract so that business men can utilize such a contract with absolute safety. The use of such contracts will also prevent needless lawsuits and disputes detrimental to the maintenance of cordial relations between all factors in the industry.[6] Everybody engaged in business has

[5] Among the associations which have adopted uniform contracts are the Assn. of American Wood Pulp Importers, American Spice Trade Assn., National Commercial Fixtures Manufacturers' Assn., National Assn. of Granite Industries, National Wholesale Grocers' Assn., American Boiler Manufacturers' Assn., Knit Goods Manufacturers' Assn., National Wholesale Dry Goods Assn., the Linseed Assn., and a number of associations in the lumber industry.

[6] *Report* of R. C. Marshall, Jr., General Manager, Associated Contractors of America, *The Bulletin,* of the Associated General Contractors, February, 1921, p. 4.

much to gain from the general adoption of sound, businesslike principles in the making of contracts. Indeed, the committee of one association which started this work with doubt as to its value at the end of two years' serious work is firmly convinced that the ultimate welfare of the industry depends upon the development of such a code of contractual relations worked out by all elements in the industry.[7]

There is a fair and an unfair method to follow in the adoption of uniform contracts. Some associations which are strong enough to dominate their industries may endeavor to force an unfair contract of their drafting upon the industry. Such action, of course, merely increases ill feeling and provokes trouble. The same principles which apply to the working out of a standardization program apply to the framing of a uniform contract for an industry. All parties who are affected by such contract should be given an opportunity to be heard and the contract adopted should be the expression of the united judgment of the industry. With the friendly support of buyers and sellers a uniform contract will be more quickly and generally adopted in the industry. The wholesale grocers have adopted a number of uniform contracts evolved in conferences with the representatives of associations from whose members the wholesalers purchase their supplies.[8] The Knit Goods Manufacturers of America and the National Wholesale Dry Goods Association have formulated a uniform contract to govern transactions between their members.[9] In the lumber industry, the manufacturers, wholesalers, and retailers working through their associations have in joint conference drawn up a form of contract which is meeting with general approval.[10] The National Lumber Manufacturers' Association, the American Wholesale Lumber Association, the National Wholesale Lumber Dealers' Association,

[7] *Report* of J. W. Cowper, Chairman, Committee on Contracts, Associated General Contractors of America, *The Contractor*, January, 1922, p. 18.

[8] *Special Bulletin*, National Wholesale Grocers' Assn., Feb. 16, 1917. This bulletin contains a number of contract forms.

[9] *Textile World*, March 12, 1921.

[10] "The Universal or Uniform Order Blank," Chas. B. Carothers, *Southern Lumberman*, Dec. 17, 1921, p. 136.

the National Retail Lumber Dealers' Associations and a number of regional and state associations have recommended the general adoption of this form in the industry.

In the construction industries, there has for years been the utmost confusion arising from the use of a multitude of contract forms by the government, different trade associations, and many individual concerns. To remedy the situation, Secretary Hoover of the Department of Commerce called a conference of the representatives of seven great associations in the industry to consider the possibility of developing a system of coördinated contracts protecting the interests of all elements in the industry.[11] Coöperation between the various factions of the industry, combined with government support, is the ideal method to follow in order to bring about uniformity of contract methods in an industry. It assures the representation, and support of buyers, sellers and all other elements of the industry. The participation of a government department should assure protection of the public interest. It need scarcely be said however that uniform contracts cannot lawfully be employed to fix prices, or terms or to exercise any undue control over competition in quality or service. And no attempt should be made to coerce any party into using such a contract against his will. If the contract is fairly drawn the benefits resulting from its use will cause its general adoption.

Salesmanship.—Associations can sometimes improve the sales ability of their representatives more economically through united action. The fertilizer manufacturers after starting a general advertising campaign to reach the farmer, discovered that their own sales forces knew little about the product they were selling and even less about the proper grades to be recommended for different crops under varying conditions. The association therefore held conferences of salesmen throughout the country.

[11] *The Constructor*, January, 1922, p. 18. The following associations were represented at this conference: American Assn. of State Highway Officials, American Engineering Council, American Institute of Architects, American Railway Engineering Assn., American Society of Civil Engineers, National Assn. of Builders' Exchanges, American Waterworks Assn., Associated General Contractors of America and the Western Society of Engineers.

Specialists on soils, crops, fertilizers and salesmanship were employed to address these conferences and a conference of the sales managers was held at Cornell University, some ninety managers and officials participating.[12] The Southern Pine Association has maintained a School of Salesmanship for the benefit of the salesmen employed by its members.[13] It was felt that the salesmen of the industry were lacking in knowledge of the principles of salesmanship, of the uses and possibilities of wood, of the merits and limitations of substitutes, and of the methods of manufacture. A course of study was therefore planned dealing with (1) the fundamentals of salesmanship, (2) manufacturing conditions, methods, and costs, (3) trade extension possibilities, (4) the merits and uses of wood, and (5) the study of wood substitutes. District meetings were held and everything possible was done to sustain the interest of the salesmen in their product and in their industry. This work has been continued for several years. Such activities by producing better salesmen and better selling methods ought certainly to tend toward enlarged sales and lowered costs of distribution. An activity of this kind can, however, be easily misused. If its purpose is not a legitimate, educational purpose but rather to control price competition and enhance price, it of course becomes unlawful.

Overstock Exchanges.—A distributor, through misjudgment of market conditions, may find himself overstocked on certain items. If he continues to hold the goods, his capital is needlessly tied up and his costs of doing business increased. Various associations use their organization as the medium through which members can advertise such stock for sale to other members who may be short on such items. The National Hardware Association has done this for some years with the result that goods unsalable in some localities have found a ready market in other communities where there was a demand for them.[14] The National Garment Manufacturers' Association also maintains an exchange bureau which acts as a clearing house for its members by issuing

[12] O. M. Kile, *Printers' Ink*, p. 105. See also, *Proceedings*, National Fertilizer Assn., Twenty-fifth Annual Meeting, 1918, p. 21.

[13] *Proceedings*, First Annual Meeting, 1916, p. 178; *Proceedings*, Second Annual Meeting, 1917, p. 10.

[14] *Proceedings*, Twenty-third Annual Convention, p. 273.

weekly bulletins of goods its members may have for disposition.[15] A nominal brokerage fee is charged for the service, which is furnished both to members and non-members. The Associated Dress Industries operating a similar exchange has disposed of over eighty thousand dollars' worth of goods by one bulletin and the United Waist League has disposed of over one million dollars' worth of raw materials within a year.[16] The National Paper Box Manufacturers' Association also maintain a merchandise and machinery exchange to assist the members in disposing of surplus commodities or machinery.[17]

Educational Work.—The business methods of many retailers could be improved. Some associations, acting on the theory that an improvement in retail distribution will react to the general benefit of the entire industry, are spending large sums of money in educational work. The Institute of American Meat Packers has worked out a general plan of coöperation with retail organizations.[18] It is making a careful study of retail management, accounting, and delivery systems. It also plans to issue bulletins covering such matters as the proper handling of packing house products from the standpoint of conservation. The wholesale grocers maintain a special committee on coöperation with the retail grocers.[19] This committee has made special studies of retail service problems, costs and similar matters. Through the trade press, pamphlets, addresses before conventions and so on every effort has been made in coöperation with the National Association of Retail Grocers to better business methods in the retail branch of the industry. Several million copies of pamphlets dealing with such matters as cost accounting systems, delivery service, stock and window display, credit extension, cleanliness, insurance, discounting of bills and so on have been distributed among the retailers. The National Lumber Manufacturers' Association

[15] "Some Queer Trade Problems Manufacturers Are Unriddling through Coöperation," C. A. Rohrbach and John Allen Murpay, *Printers' Ink*, Sept. 23, 1920.

[16] *Ibid.*

[17] National Trade Associations, A study by National Assn. of Manufacturers, 1922, p. 195.

[18] *Printers' Ink*, Nov. 4, 1920, p. 146.

[19] *Proceedings*, Eleventh Annual Meeting, National Assn. of Wholesale Grocers, 1917, pp. 133, 144.

for some years has actively aided the retail lumber dealer in the broader problems of retail distribution. Dealers have been fully informed as to the characteristics and proper uses of the several varieties of wood, effective service methods, opportunities for sales in special fields, methods of meeting mail order competition and given the effective assistance of national advertising campaigns. Paid representatives of the association have traveled among the retailers aiding them in installing service departments and more sound methods of merchandising to increase their ability to compete with dealers in competitive products.[20] The Knit Goods Manufacturers of America publish a special trade paper containing educational matter intended to help the retailer.[21] There is a growing number of associations which are closely coöperating with their distributors aiding them in every way possible to improve their business methods.

Educational work among other factors in the trade may also make selling easier. The Southern Pine Association has published a series of engineering bulletins designed to furnish to architects and engineers complete technical information and reference data on practically all phases of the use of wood as a construction material. These bulletins cover such subjects as the use of timber for structural purposes, physical properties, preservative treatments, fire retardants and so on.[22] The cement association, the brick associations and various other associations have conducted extensive campaigns of this character.

The education of the consumer and user as to the merits and uses of a product may be of value in reducing sales resistance and lowering distribution costs. The value of coöperative advertising in enlarging demand and reducing selling costs has already been discussed in a previous chapter. It is probably the greatest single agency making for expeditious distribution. Many associations have developed great educational campaigns in connection with their advertising programs. The National Fertilizer Association has carried on an intensive program among the farmers utilizing the forces of the U. S. Department

[20] R. S. Kellogg, Secy., *Proceedings*, Second Annual Meeting, Southern Pine Assn., p. 61.

[21] *Printers' Ink*, April 8, 1920, p. 133.

[22] *Proceedings*, First Annual Meeting, p. 80.

of Agriculture, the state agricultural colleges, county agricultural agents, and the farm papers for this purpose.[23] The cooperation of seed houses, canners, and farm machinery companies has also been secured. The National Association of Lumber Manufacturers has for years carried on an educational campaign which has had the widest ramifications. Newspapers, moving pictures, educational work at colleges and trade schools, traveling exhibits at fairs and conventions, lectures before clubs and other public organizations have all been utilized to convince the consumer as to the merits of lumber.[24] The wholesale grocers have even had a book written on the geography of foods, for possible use in the schools as a reference work. The National Dairy Council, the Portland Cement Association and a number of other associations have used every possible agency to convince the consumer of the merits of their products and thus make selling easier for their distributors.

The beneficial results of these several activities cannot be gainsaid. Industry and public both benefit. With increased transportation rates and other factors enlarging costs of distribution any activity which will tend to reduce such costs is a public benefit. An association which simplifies and clarifies the basis on which business transactions of the industry are conducted through the adoption of simple rules and fair contract forms is forwarding not only its own interests but those of the nation as well. An association which reduces the friction and drag on distribution through the education of the salesmen of the industry, of distributors, and of the general public speeds up the transaction of business, increases productivity and betters conditions generally. Such activities when they are not misused for ulterior purposes deserve the support and approval of the general public.

[23] *Proceedings*, Annual Meeting, 1918, p. 21 ff.

[24] E. A. Sterling, Mgr., Trade Extension Bureau, First Annual Meeting, Southern Pine Assn., p. 75 ff.

CHAPTER XIV

FOREIGN TRADE

RECENT years have seen an increasing emphasis placed upon the value of foreign trade as a factor in maintaining prosperity. First an agricultural nation, we have developed into a great manufacturing nation and have now definitely become an exporting nation. Our greatly enlarged productive capacity, our enormous holdings of gold, our great merchant marine, our rapidly developing banking facilities abroad, make the maintenance and development of foreign trade of the first moment. Our largest, highly integrated corporations, can maintain their position in foreign trade through individual organization. But the great bulk of American manufacturers cannot hope to meet singly the competition of the great government fostered cartels of Germany, the comptoirs of France and the closely organized trade combines of England. The single manufacturer finds the varying customs, laws, transportation conditions and so on in the many countries an almost insurmountable obstacle to the successful development of permanent business. The smaller manufacturers must possess some sort of an organization to aid them and they must depend upon a reasonable measure of support from the government. Both are available. Any industry can utilize its trade association as a medium of assistance in foreign trade development or it may create a separate export association to engage solely in export trade. Both will have the effective assistance of the various government agencies interested in foreign trade, such as the Commerce Department, the Federal Trade Commission, the Tariff Commission, the State Department and the Federal Reserve Board.

Foreign Trade Work by Trade Associations.—A trade association with a foreign trade department, can be very helpful to its members who have a foreign business. The Tanners' Council, for example, have made their association of practical

help to its members.[1] This association maintains a large file of credit reports on buyers throughout the world. It has published an international code for use by the hide and leather trade, which has enabled its users to cut their bills in half. It aids in the adjustment of complaints arising out of sales of goods to foreign buyers, in order to protect the good repute of American goods in foreign markets. Information regarding foreign tariffs, marking regulations, regulations regarding traveling salesmen, foreign patents and trade-mark laws, and many other difficult questions are furnished the members. The International Association of Garment Manufacturers maintains an export bureau which advises its members as to packing, labeling and shipping, furnishes lists of advertising mediums and advertising suggestions, maintains credit ratings on foreign buyers and assists its members in every way possible in the furtherance of their export trade.[2] The National Association of Manufacturers also maintains a foreign trade department, with the following divisions: Latin-American Division, Far Eastern Division, Russian Division, Credit Investigation Bureau, Compilation Bureau, Translation Bureau, Trade-marks Bureau, Customs Tariff Division, Bureau of General Investigation and Special Service Division.[3] Secretary Hoover is rapidly developing, in the Department of Commerce, a great organization for coöperation with business men in the development of foreign trade. Some seventy committees from the various trade associations of the country, representing about 150,000 firms have been appointed to work in close coöperation with the Department, in order to maintain intimate contact with foreign trade development.[4] The Bureau of Foreign & Domestic Commerce is endeavoring to keep in closest possible touch with foreign trade matters, whether they be tariff changes, packing methods, op-

[1] Edward A. Brand, Secretary, Tanners' Council, *New York Evening Post*, April 1, 1922.

[2] A. F. Allison, Secretary, *New York Evening Post*, April 1, 1922.

[3] National Trade Association, A Study by the National Assn. of Manufacturers, 1922, p. 109.

[4] Address, Dr. Julius Klein, Chief, Bureau of Foreign & Domestic Commerce, Official Summary, *Proceedings*, Conference Trade Assn. Representatives, Washington, D. C. April 12, 1922.

portunities for new business or what not. It maintains a force of commercial attachés and trade commissioners in many countries to aid in the development of new business for American firms. In order to secure the quickest diffusion of trade information at the minimum of expense, and to prevent such confidential data reaching foreign competition, the Department is now utilizing the trade association as the medium of distribution. Any trade association whose members are interested in foreign trade should not fail to avail itself of the valuable assistance of this bureau, as well as the aid of the Consular Service and Trade Advisers' Office of the State Department.

Export Associations.—On the recommendation of the Federal Trade Commission, the National Foreign Trade Council and various trade bodies of the country, Congress in 1918 passed the Export Trade Act, known as the Webb-Pomerene law. This Act, as has already been pointed out,[5] limits the prohibitions of the Sherman Law and permits the American business man to form coöperative selling agencies for the disposition of his products in foreign trade. In a general way it may be said, this Act recognizes the formation of combinations, or associations of manufacturers or others engaged *solely in export trade,* provided they neither restrain trade in the United States nor restrain the export trade of their domestic competitors. Any acts done by such associations in export trade are also made lawful if they do not intentionally or artificially enhance or depress domestic prices, or substantially lessen competition, or otherwise restrain trade in this country. But no unfair acts against American competitors in foreign trade are permitted. The prohibitions of Section 7 of the Clayton Act against intercorporate stockholders is qualified, by the permission granted to any corporation to own stock in an incorporated export association, unless the effect of such ownership is to substantially lessen competition in the United States. This Act, therefore, may be broadly said to remove the prohibitions of the Sherman Law in so far as it applies to export trade solely, and so long as there are no undue reactions on the domestic situation.

On June 30, 1921, there were 48 such export associations do-

[5] See p. 12. For text of act, see p. 292.

ing business, including in their membership about 1,000 plants and factories scattered over forty-one states.[6] During 1920, despite the great handicaps on exportation, imposed by economic conditions, goods valued at approximately $221,000,000 were exported by such associations.[7] Among the commodities handled by these organizations were steel, copper, cement, lumber, foodstuffs, locomotives, textile and foundry material, paper, tanning materials, paint, furniture, office equipment, and general merchandise. Some of these associations, such as the Consolidated Steel Corporation and the Copper Export Association which are strongly financed and control a large percentage of the supply available for export, have quickly become very powerful factors in our export trade.

Advantages of Export Associations.—There are many advantages accruing to the members of such organizations.[8] First, such an organization, if it controls the bulk of the export supply, frees its members from the old practice of foreign buyers of playing one American merchant against another until prices were unduly depressed. An export association can deal on a parity with combinations of foreign buyers, or with governmental buying organizations. Secondly, distribution costs are greatly decreased. Advertising expense and general selling expense per unit can be reduced. An expert personnel, too costly for a single exporter to employ, can be maintained. Overhead expenses of all kinds can be lessened. Information regarding foreign market conditions, shipping facilities, improved packing methods, credit standing of foreign purchasers can be more comprehensively and accurately secured. Third, the requirements of foreign buyers can be more exactly satisfied. The product can be standardized and also clearly identified through an association trade-mark. Shipments can be prepared and inspected by an association representative, with a resulting decrease in claims and disputes. Cargo shipments of bulk commodities can

[6] *Annual Report*, Federal Trade Commission, 1921, p. 59, 60.

[7] *Ibid.*, p. 60.

[8] For a complete statement of advantages of such associations, see *Annual Report*, Federal Trade Commission, 1921, p. 61; also, Article by William Notz, Chief Export Trade Division, Federal Trade Commission, *Commerce Reports*, February, 1922, p. 482.

be more readily handled and prompter delivery assured. Fourth, domestic trade, seasonal in character, may be stabilized. The paint industry, for example, is endeavoring to develop markets in South America to counter-balance the lessening domestic demand during the winter months.[9]

Finally, an industry is placed in a much stronger position for competition with foreign selling organizations in international trade. Great combinations have been formed and are constantly being formed in foreign countries whose competition will have to be met by American industry. The British Woollen Trades' Export Association, the Canadian Export Paper Company, the Union of German Exporters, the Comptoir for the Exportation of Metallurgical Products of France, the Swedish Wood Export Association, the Purchasing & Selling Association of Cotton Spinners of Czecho-Slovakia, and the Chile Nitrate Association, are typical of the recent great foreign organizations formed for active participation in international trade.[10]

Membership.—An export association may be formed with the purpose of controlling the export trade of a commodity, or with the purpose merely of providing an efficient selling agency for a few members. Typical of the first type of association is the Copper Export Association, while the American Milk Products Corporation is an example of the latter. A determination of this question will also decide the number of members and the character of the membership. A large membership, while it gives great trade advantages, through the substantial control acquired over export trade, may cause difficulty in operation by reason of disputes over allocation of orders, division of profits and so on. The Copper Export Association opens its membership to any producers. The United States Office Equipment Export Association provides that no member shall be admitted except upon consent of the present members. The Douglas Fir Exploitation and Export Company limits its membership to the concerns engaged in the manufacture of lumber on the Pacific Coast. A smaller organization avoids these difficulties of management and tends to secure flexibility and speedier adminis-

[9] *Commerce Reports*, Department of Commerce, February, 1922, p. 482.
[10] *Annual Report*, Federal Trade Commission, 1921, p. 63.

tration. But unless it controls a substantial proportion of the production, its control of the export market will, of course, be negligible.

Organization.—Having determined on its membership, the members must decide upon the form of organization. An export association requires very careful planning, which should not be attempted without advice of counsel. The form of organization, the methods of raising capital, the control of the corporation, the allocation of orders, the division of profits, compliance with State incorporation laws, and compliance with the Webb Act require very careful consideration. They can fix their organization by contract, or they can incorporate under State laws. If the organization is effected by contract and there are only a few members, simplicity and flexibility are secured and corporation taxes and regulations largely avoided. The United States Office Equipment Export Association was formed in this way. But on the other hand, there may be a personal liability attached to each member. Practically all export associations thus far formed, have been incorporated because of the obvious advantages of such a form of organization. Individual liability of stockholders is avoided. The existence of the corporation is clearly defined and cannot be affected by the death or disability of any member. The member's interest is definite. Changes in the form of organization and methods of doing business may also be readily secured. Most export associations have, therefore, adopted the corporate form of organization.

The capital requirements of an association are controlled by its method of operation. An association acting merely as an agent, will not need as much capital as one buying the product outright. If each member finances the business allotted to him until delivery on the pier, much less capital will be needed. A sufficient capital should be provided to give the banks protection and also to provide a reasonable fund for exigencies. The reputation of the members of the association will, of course, furnish a certain credit standing. If the association is not incorporated, capital can be secured by assessment to the amount provided for by agreement. If the association is incorporated, the necessary capital for operation is usually secured by stock subscription. Some export associations, such as, the Consoli-

dated Steel Corporation, have a large amount of stock issued. The Copper Export Association, has secured a considerable amount of capital through the sale of its notes to members and outside parties. Stock subscriptions may be made on several bases. They may be voluntary and in such amount as each member desires to subscribe. They may be fixed on the basis of relative production, capacity or on the total sales of members. A reasonably fair method is, if the concerns interested have been engaged in foreign trade, to apportion capital requirements among the members on the total average export sales over a period of years.

The control of the association should be carefully determined and clearly understood by all members. It will usually not be found wise to permit outsiders to hold the stock carrying voting powers. Voting powers may be based either upon the stock subscription, as is the custom with the ordinary corporation, or it may be found desirable to give each member only one vote, regardless of the number of shares owned by him. Such an arrangement is, of course, attractive to the smaller manufacturer and is more likely to secure the support of the whole industry and the association. The American Paper Exports, Inc., and several other associations, give one vote per share of stock held. The Douglas Fir Exploitation and Export Company, in order to prevent any control of the association for private purposes against the best interests of the industry, gives each stockholder one vote, regardless of the amount of stock held by him and has established a voting trust, the Trustee voting the remaining stock in accordance with the majority vote of the stockholders.

The methods of operation of such associations are constantly changing, in response to changes of conditions. The following illustrations of typical plans of operation are outlined by Dr. William Notz, Chief of the Export Trade Division, Federal Trade Commission:

Association A (incorporated), which has been in successful operation for about three years, sells in the export market such products as are pledged for that purpose by its members (stockholders), accounting to them for the average prices realized on such sales quarterly as prescribed by agreement. The association sells also on a commission basis for other

concerns (not members of the association) and occasionally it buys goods in the open market in order to complete shipment on orders taken by the association for export sales.

Association B (unincorporated) exports raw material, operating under an agreement which provides that the association through its council, which consists of one representative from each member, fixes minimum prices, form of sales contracts, and other regulations governing export sales, the orders for which are obtained by the manager of the association, either direct from the foreign consumer or through agents abroad, and are allocated by the manager among the members of the association according to predetermined percentages of participation. All expenses incurred by the association are borne by all members at the time the expense accrues, in proportion to their respective predetermined percentage of participation.

Association C (incorporated) is an exporter of foodstuffs and sells the products of its members in various foreign countries through agents, who, in most cases, have contracted to represent the association exclusively in their territories. Through American banks the association draws upon the buyer for the purchase price, either directly or through the foreign agents. The association also consigns goods to some of its agents abroad for sale by them while in transit or as soon after arrival as is convenient; and at the same time the association draws upon the agents for a portion of the market value of the goods. When the sale to the foreign buyer is accomplished, the agents remit the full sale price to the association.

Association D (unincorporated) is composed of manufacturers, and all the subscribing firms contract to do all export business through the association. The association makes all contracts with foreign representatives, and export agents receive all orders and apportion them to members. Members deliver and invoice merchandise to the association, which becomes immediately liable for the sale price thereof. The association assumes all the responsibility and risk of shipment, insurance, export documents, credit, etc., and as the organization is purely mutual, these expenses and loss (if any) are prorated among members upon the basis of business done with and through the association.

Association E (incorporated), which contracts for the exportation and installation of especially prepared products, advertises for and solicits business in various foreign countries. As orders are accepted or contracts made, the association buys from its member companies the supplies needed for the filling of such order or contract, buying from oustide concerns any goods not supplied by the member companies.

Association F (incorporated) is a combination of mills. All stockholders have agreed to sell for export only through the association and to refer all inquiries to the office of the association, where all quotations are made and all business transacted. The association issues orders to the member for such material as is sold, according to the percentage of stock held in the company (association). All documents are in the name of the association and goods exported bear a common brand. Payment of in-

voices for goods shipped is made upon 100 per cent f.o.b. seaboard basis, after deduction of c.i.f. expenses. The gross monthly expenses for the operation of the company (association) are charged to the member concerns upon a percentage basis determined by the relative holding of stock without par value of each member.[11]

Such plans of operation, of course, must be very carefully provided for in the by-laws and agreements made by the association with the individual members.

Legality of Export Associations.[12]—The Webb Act was designed to remove the restriction of the Sherman Law so far as the law was applicable to combined sales agencies in export trade.[13] The Senate Committee in the report just cited, however, stated the intention of Congress to limit the activities of such associations as follows:—

". . . the committee aims to place three limitations upon these associations, their acts and agreements:

"(a) The authority hereby conferred should not result in restraint of trade within the United States which is clearly prohibited by the Sherman law.

"(b) While the purpose of the bill is to increase our foreign trade, it should not result in destroying the business of other companies, associations, or individuals, who may be engaged in foreign trade. The purpose is to increase and improve this trade and not to injure it.

"(c) While we realize that any sales in foreign commerce may incidentally and temporarily result in the increase in prices of the same articles to home consumers, these associations ought not to be permitted to so conduct their affairs as to artificially or intentionally and unduly enhance prices of the commodities in which they are dealing to the home consumer."

[11] *Commerce Reports*, February, 1922, p. 481. For other valuable suggestions, see Official Report, Fourth National Foreign Trade Convention, 1917, pp. 265-86; *Proceedings*, Ninth Annual Convention, American Manufacturers' Export Assn., 1918, pp. 298-315.

[12] For a complete legal discussion of the Webb Act, see Chaps. XII, XIII and XIV of the valuable treatise, "American Foreign Trade," by William F. Notz and Richard S. Harvey.

[13] *Report* No. 9, Senate Committee on Interstate Commerce, 65th Congress, 1st Session, p. 3; *Report* No. 1118, House Committee on the Judiciary, 64th Congress, 1st Session, p. 3.

To preserve the benefits flowing from immunity from the Sherman Act, a coöperative selling association must be exceedingly careful to comply with all the requirements of the law. It is expressly provided, and this cannot be overemphasized, that such an association can engage *only* in "export trade." The words "export trade" are defined by Section 1 of the act as meaning solely trade or commerce in goods, wares or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation. It is specifically provided that these words shall not be deemed to include "the production, manufacture or selling for consumption, or for resale, within the United States or any Territory thereof, of such goods, wares or merchandise, or any act in the course of production, manufacture or selling for consumption or for resale." The definition of the word "export trade" would seem to require such an association as such to actually trade in the physical goods with the intention of making another country the final destination of the goods.[14] A liberal interpretation of the word "commerce" however might justify the organization of an association merely for the purpose of agreeing as to the price to be charged on all export sales. The word commerce means more than the sale or exchange of commodities which is really embodied in the word trade. The term apprehends also commercial intercourse between nations and parts of nations in all its branches and all the instruments by which commerce is conducted.[15] Every negotiation, initiatory and intervening act, or contract between parties which causes a traffic in goods or information is commerce.[16] It is therefore not certain but that an organization merely for controlling the prices made on export sales by its members could secure the benefits of the law. The danger, however, of such an organization affecting domestic prices, as well as the apparent

[14] See *Swan & Finch Company vs United States,* 190 U. S. 143 (1902); *Thompson vs United States,* 142 U. S. 471.

[15] *Snead vs Central of Georgia R. R. Co.,* 151 Fed. 608, 613; *Gibbons vs Ogden,* 9 Wheat (U. S.) 1, 229; *Hopkins vs United States,* 171 U. S. 578.

[16] *United States vs Tucker,* 188 Fed. 741, 743.

attitude of the Federal Trade Commission, would make such an organization unwise. The association, therefore, should be an actual selling organization.

Its sales in the United States must be solely of goods in the course of being exported from this country or any of its territories. Such an association may sell to buyers in foreign countries, or their representatives in the United States for exportation. There has been some question as to whether the act permits the sale of goods within the United States for export. The intent of Congress to permit this is clearly shown by the following language, appearing in the report of the Senate Committee on Interstate Commerce:[17]

> "We desire, of course, to authorize associations for the sole purpose of selling abroad. In order to do this, they must have the right to acquire or buy within the United States, and the right to sell within the United States for the foreign market."

In the event, however, any sale is made within the United States to any foreign buyer or export house, the association, as a measure of protection, should secure from the buyer a statement that the goods are being purchased for exportation.

An export association formed under the law, cannot sell within the United States for domestic consumption or resale.[18] It cannot produce or manufacture goods in this country, although it may have goods produced or manufactured for it under contract. Both the wording of the act and the intent of Congress is clear on this point.[19] It can probably assemble its product abroad or manufacture articles abroad from goods exported by it.

An association organized under the Act, under the wording of Section 1, cannot export to the Philippine Islands, Porto Rico, Alaska, Hawaii, or the Panama Canal Zone. It appears also that export associations may be formed in Hawaii, Alaska and Porto Rico, but that their formation is not permitted in

[17] *Rep.* No. 9, April 16, 1917, 65th Congress, 1st Session, p. 2.
[18] *Ibid.*, p. 2.
[19] *Ibid.*, p. 2.

the Philippines, the Panama Canal Zone, Guam and the other small insular possessions of the United States.[20]

Nor can such an association import goods into the United States. If it does so it loses the immunity conferred by the Act. If its importations are so substantial that they unduly restrict competition in such products in domestic trade, it will also be liable to prosecution for violation of the Sherman Law. In making importations, it might also run afoul of certain live provisions of the old Wilson Tariff Act. Section 73 of this Act, as amended in 1913, declares unlawful every combination, conspiracy, trust, agreement, or contract, between two or more persons engaged in exporting any article from a foreign country into the United States, when "intended to operate in restraint of lawful trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any articles imported, or intended to be imported into the United States, or of any manufacture into which such an imported article enters, or is intended to enter." In view of these various considerations, therefore, such an association should not, under any circumstances, engage in the importation of goods. It is not improbable, however, that such an association could lawfully accept foreign goods, in payment for its own goods, disposing of such goods abroad, if such action was incidental and necessary to the conduct of its export trade.

Section 2 of the act places careful limitations upon such an association to protect domestic trade from any unlawful restraints. The fear was constantly expressed during the debates in Congress, that the formation of great export combinations would have harmful reactions on domestic conditions.[21] For this reason, various restrictions were imposed on such organizations. The law very clearly provides that an export association must not, by any act, restrain trade within the United States, or restrain the export trade of any domestic competitor. It cannot lawfully enter into any agreements or conspiracy, or do

[20] See "American Foreign Trade," by Notz & Harvey, p. 181 ff. for comprehensive discussion.

[21] Congressman Graham, *Cong. Record*, June 13, 1917, p. 3850; Congressman Cannon, *ibid.*, 3840; House *Report* No. 50, Minority Report Committee on Judiciary, 65th Cong., 1st Session, p. 8.

any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by the association, or which substantially lessens competition or otherwise restrains trade within the United States. It was recognized by Congress that the enlargement of our foreign trade might withdraw a portion of the production from domestic trade and result in an incidental increase in price, due to the natural operation of the law of supply and demand.[22] As long as the increase is not artificially or intentionally brought about, it is not unlawful. It was pointed out in the debates that such an incidental effect upon the domestic market might spring from any increase in foreign trade and that to compel producers to confine themselves to home markets, because of this effect, would result in stagnation.[23] It is forbidden, by Section 4, to use any unfair methods of competition in its export trade against competitors engaged in export trade, even though such methods are used outside the territorial limits of the United States. This provision enlarges the prohibitions of existing laws, as under the decision of the Supreme Court, the provisions of the Sherman Act did not extend to acts done in foreign countries, even though they were done by American citizens and injured other citizens of the United States.[24] While these various provisions may sound complicated, in fact they are not. They simply mean that such an association must not engage in domestic trade or take any action injuriously affecting competition, or prices, in domestic trade, and that fair methods must be used against American competitors in foreign trade.

Every association formed should carefully comply with the statutory requirements. Section 5 of the act provides that every association within thirty days after its creation shall file with the Federal Trade Commission a verified statement, setting forth the location of its offices, places of business, the names and addresses of its officers, stockholders, or members. If a corporation, the association must file a copy of its corporate charter and

[22] Senate *Rep.* No. 9, Report of Committee on Interstate Commerce, 65th Cong., 1st Session, p. 3.

[23] Congressman Caraway, *Cong. Record*, June 13, 1917, p. 3849.

[24] *American Banana Company vs United Fruit Company*, 213 U. S. 347 (1909).

by-laws. If unincorporated, a copy of its articles or contract of association must be furnished the Commission. This statement must be furnished annually thereafter on the first day of January. It is also required to furnish any information requested by the Commission as to its organization, business, conduct, practices, management and relation to other concerns. Any association failing to comply with these requirements is liable to forfeit to the United States one hundred dollars for each day's failure to supply the data required. Parties proposing the formation of export associations will find it helpful to consult with Commission officials in the formation of their plan of organization.

The effectiveness of export associations as an agency in international trade is being tested. Already some associations formed have perished. Other associations, such as the Consolidated Steel Corporation and the Copper Export Association, have become very powerful organizations. The general movement towards centralized buying in Europe, the further development of great combinations abroad, must intensify competition in international trade. It is certain that more and more world competition is becoming group competition, in which the small manufacturer cannot hope to individually compete without assistance. It is doubtful whether any but the larger manufacturers can maintain their position in foreign trade against the competition of great units representing the entire industries of foreign countries. If the great bulk of the smaller manufacturers of America are to participate in the benefits flowing from an established export trade, it appears highly probable they will have to work through common selling agencies, such as the Webb Act is designed to legalize. The ability and salesmanship of American business men, backed by the enormous economic resources of the country, organized for effective coöperation, ought certainly to maintain the position of America in foreign trade in the face of any and all competition.

Edge Act.—In 1919, to strengthen American business in foreign fields, the Edge Act, authorizing the formation of banking corporations to do an exclusive foreign banking business was enacted.[25] The purpose of this law was to afford agencies

[25] Act of December 24, 1919, Fed. Stat. Annot., 1919, Supp., p. 268.

through which long-term credits could be financed in export trade and through which foreign securities could also be handled. Under the provisions of the law, not less than five persons may form such banking corporations to engage in international banking or financial operations. These banks are given very broad banking powers. The power is granted under such regulations as the Federal Reserve Board may prescribe, to purchase, sell, discount and negotiate, with or without its endorsement or guaranty, negotiable instruments as well as cable transfers and other evidences of indebtedness; to deal in securities, including the obligations of the United States or any State thereof but not in the shares of stock of any corporation, except those specifically provided in the Act; to accept bills or drafts drawn upon it subject to certain restrictions; to issue letters of credit; to purchase and sell coin, bullion and exchange; to borrow and to lend money; to issue debentures, bonds and promissory notes under limitations prescribed by the Federal Reserve Board; to receive deposits outside the United States and within the United States when for the purpose of carrying out transactions in foreign countries and to exercise the incidental powers conferred by the Act, or which may be usual, in the determination of the Federal Reserve Board, in connection with the transaction of the business of banking where the corporation transacts its business. Such banks are given power to maintain branches or agencies in foreign countries and to purchase and hold stock in other corporations created under the Act or in corporations not generally engaged in the business of buying and selling commodities in the United States. Restrictions are provided as to the amount to be invested in any one corporation. Safeguards are provided to protect the interests of the public. Such an institution can not carry on any part of its business in the United States, except such as in the judgment of the Federal Reserve Board is incidental to its foreign business. It can not exercise any of its functions until authorized to commence business by the Federal Reserve Board. It can not engage in commerce or trade in commodities (with certain limitations), nor directly or indirectly attempt to control or fix the price of any commodities. It must have a capital stock of $2,000,000 or more, one-quarter of which must be paid in before it can begin business. A majority of

the shares of the stock of the corporation must be owned by American citizens or by concerns, the controlling interest in which is owned by citizens of the United States. If such a bank violates these, or other specified provisions of the act, it forfeits all its rights, benefits and franchises, under the act. Already some very large and powerful banking institutions have been created under this law. It gives promises of centralizing our banking interests in foreign trade, so as to enable them to more effectively cope with conditions existing in international finance, just as the Webb Export Act enables coöperation among business men in export trade. A proper coördination of efforts between the export associations of the country and the Edge banks ought greatly to strengthen the ability of American business to compete in world markets.

CHAPTER XV

GOVERNMENT RELATIONS

Contacts Between Industry and Government.—Most industries have three important forms of contact with the Government. The first is with Congressional Committees, in the consideration of pending legislation. The second is with regulatory bodies, such as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board and the Department of Agriculture, in the formulation or application of regulations. The third is in the formulation of constructive programs for the good of the industries, with those departments such as the Department of Commerce, whose function it is to serve and develop industries when such action furthers the public good. This third class of activities has already been discussed in the preceding chapters. In the maintenance of helpful and informative relations with the government involved in the first two contacts mentioned, American industries have been appallingly lax.

Failure of Industries to Present Facts.—Many business men rail at Congress and at the federal commissions for unwise legislation and harmful regulation, when fully one-half the responsibility is theirs, because of their utter failure to produce facts to prove the harm which will inevitably flow from the proposed action of the government. It is true that the Chamber of Commerce of the United States has been a powerful factor in the crystallization of business sentiment and in the effective presentation of the viewpoint of business in general to the Government. But by the nature of its organization, it is limited in its work to a consideration of matters which have a common interest to industries generally. Each industry has its own peculiar problems which constantly bring it in contact with the federal and state governments. Yet, the great majority of American industries have no organization whatsoever for the

comprehensive compilation and presentation of facts to governmental bodies.

The customary procedure is this. The association maintains a legislative committee. This committee, if its members are generous and unselfish of their time, and the industry is one subject to excessive regulation, will probably closely follow governmental activities. In other industries, where the committees are not so active, not only once but numerous times, it has happened that legislation has been on its way to final passage, or regulations promulgated, without the knowledge of an industry, when even a slight degree of attention would have advised the industry of the pendency of such action. In several instances, industries or branches of industries have faced action threatening their extinction before they were even aware it was proposed. During the war, when priorities and other strict regulations were necessary, more than one industry found itself faced with possible annihilation because of its lack of data proving the character of its distribution, its exact costs and similar information demanded by the Government. Constantly, hearings are being held on legislation and proposed regulations, where the presentation of facts for an industry is trivial, and in no sense helpful. Usually the members of the legislative committee, or other members of the association acting as substitutes for them, appear before government officials on several days' notice with wholly inadequate preparation,—with strongly expressed opinions, but few facts. Group prejudices and factional agitation are often the basis for legislative changes. In fact a considerable part of our legislation is enacted because of the opinions of large economic groups. Opinions can not be successfully fought with mere opinions. Facts, persuasively and comprehensively marshalled, are the most effective weapon of protection. Most hearings, however, are remarkable for their paucity of facts. Yet it is in industries where such methods are followed that the censure of Congress and commissions is most severe.

If the business men of an industry fail in their duty to maintain an organization which can fully, on short notice, present the facts bearing on any proposed legislation, when other agencies are strongly supporting such action, they have only themselves to blame if unwise legislation is adopted. If they

force government officials to draft regulations, which they are under a legal duty to promulgate, with only a partial knowledge of the facts because of the failure of the industry to cooperate in furnishing complete data, the sure penalty is unintelligent and restrictive regulations. In the shifting social, economic and political movements daily affecting commerce, should not every industry for its own interest, as well as the public interest, be effectively organized to see that the true conditions of an industry are at least brought to the attention of our legislators and our commissions. The voice of an organized industry is greatly strengthened when it fortifies its opinions with facts.

Value of Organization in Relations with Government.—An industry which is thoroughly organized can function effectively in all its relations with the Government. In tariff hearings, its cost accounting work enables it to present accurate data on labor costs and on the details of any items of cost. Taxes, likewise, are of immense importance to most industries. In the formulation of legislation with reference to luxury taxes, sales taxes, excess profits taxes and what not, an association's expert statistical and economic organization can quickly gather relevant data and make an effective portrayal of the certain economic effects of such legislation. Facts, not theory, with reference to such matters as depletion, depreciation, average profits, valuations, and so on can be mustered to avoid unreasonable tax regulations. Transportation rates, in view of the highly specialized organization of the carriers for handling such matters, can be held at a reasonable level, only by a convincing proof that proposed rates or changes are unreasonable,—sometimes a difficult task, unless expert traffic men schooled in the facts of the industry are instantly available to make a strong presentation. Proposed regulations affecting competition, by such bodies as the Federal Trade Commission, can be supported or combated by proper action, if the industry knows and presents its facts; otherwise totally inadequate evidence in a single proceeding may mislead the commission and result in the establishment of hampering rules of law. In the formulation of government standards, association research bureaus whose experts are also fully informed as to factory operations and trade conditions, can substitute for mere assertions irrebuttable data.

Expert coöperation with the agencies of government, as, for example, such as that now carried on by several associations with the Department of Commerce, may save enormous economic waste to the industry and to the public. In endless ways, with the growing complication of society, every industry faces restrictions and demands for restrictions, which can only be defeated or directed along constructive channels by convincing proof of their harmfulness. And in many industries, effective organization can make possible the realization of constructive plans for the good of the industry and the general public.

Some of the great associations of the country, such as the National Automobile Chamber of Commerce, the National Association of Lumber Manufacturers, the American Railway Association, the Southern Pine Association, the Portland Cement Association, the Silk Association of America, the National Association of Manufacturers, the National Coal Association, and others, are organized in this manner, and their comprehensive organization and presentation of business and economic data, has repeatedly been the means of preventing the enactment of unwise legislation, of defeating harmful regulations, and of saving their industries huge sums of money. The organization of all branches of an industry into a single unit greatly strengthens the industry in its relations with the government. Typical of such organizations are the National Dairy Products Committee, the American Lumber Congress, and the American Construction Council. Every industry needs such an organization for the study of common problems and for the personal contact between leaders of the industry which corrects misunderstandings and betters trade relations.

National legislation and regulations have the most far-reaching effects for good or ill. They can work immeasurable harm or great benefit. It seems strange indeed that each industry does not maintain an efficient organization qualified, by reason of ability and possession of facts, to cope with the constantly recurring situations which arise in their relations with the Government. Sometimes, of course, an industry thrives on the concealment of facts. When an association, for example, endeavors to secure an excessive duty per pound on a commodity which sells in the market on a tonnage basis, as has been attempted,

such an industry naturally wants to conceal facts, but such an attitude is representative of very few industries. The lack of effective organization is due in part to the apparent impossibility of convincing many business men that there is such a thing as an indirect or intangible benefit, which is of practical benefit to him. The greatest benefits from association activities, are often the intangible benefits, such as, the stabilization of the industry, the elimination of unfair trade practices, or the defeat of regulations which may work great harm without a corresponding public benefit. The greatest difficulty faced by every association in the conduct of its work, is to convince its own membership that the value of coöperative effort, effectively organized, is worth to each member at least one-half the salary of an office boy. But the exceptional organizations of some industries are an earnest of the future. Ultimately, beyond doubt, every industry of any importance in this country will be so organized that it can perform the duty it owes itself to coöperate with the Government in working out a constructive program, based upon facts, in order that the exercise of government control may be reasonable, fair and in the interest of both the industry and the general public.

CHAPTER XVI

COLLECTIVE ACTIVITIES PROHIBITED BY LAW[1]

A TRADE association as such is not unlawful. Society itself is an organization and it does not object to any business organization the purposes of which are lawful.[2] The courts recognize the necessity of associations for the improvement and progress of industry and no legislation or public policy forbids such asso-

[1] The activities of a trade association are the acts of its combined membership. A member of an unincorporated association having knowledge of the policies of the association and acting in conformity with them, is a party to such action and is liable if the action is unlawful. *Loder vs Jayne,* 142 Fed. 1010, 1018 (1906). Indeed, such liability attaches if he knows of the illegal purpose of the association and its illegal methods, if he remains a member without objection to any illegal action, even though there is no proof of his individual participation in any overt act. *Knauer vs United States,* 237 Fed. 8, 20 (1916). A member whose association is an illegal combination in restraint of trade is liable for damages to another resulting from the unlawful acts of the association, even though he had no direct contractual relationship with him. *City of Atlanta vs Chattanooga Foundry & Pipe Works et al.,* 127 Fed. 23, 26 (1903). An association is under a duty if members under its control commit unauthorized acts in furtherance of a general program of the association, to disavow such acts by causing such offending members to be disciplined or expelled or the association will be deemed liable for such acts. *Alaska Steamship Company vs International Longshoremen's Assn. et al.,* 236 Fed. 964, 972 (1916). By Section 14 of the Clayton Act, directors, officers and agents of a corporation authorizing or doing acts in violation of the anti-trust acts are liable to fine and imprisonment. Stockholders in an incorporated association who directly participate in the unlawful acts are individually liable. Fletcher's Cyclopedia on Corporations, Vol. 6, Section 4138. Every member of a trade association ought, therefore, to know in a general way the types of combined actions which are prohibited by the anti-trust laws, and every association should have as its counsel an attorney fully informed as to the scope and purposes of this legislation.

In this discussion not only court decisions, but also indictments, petitions, and consent decrees are cited. While not controlling or legal precedents, indictments and consent decrees are persuasive evidence of the attitude of the government which no association official can afford to ignore.

[2] *Gompers vs Buck Stove & Range Co.,* 221 U. S. 418, 439 (1911).

ciations when organized and maintained for proper purposes.[3]

But the test of lawfulness of an act by a trade association is more severe than the test applied to individual acts. There is a potency in numbers either for good or evil which causes the law to view with extreme care any associated action which may affect competition. This view is expressed in the following language by a Pennsylvania Court quoted by Justice Harlan in the Knight Case:

> "The increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse not only oppressive to individuals but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."[4]

This difference between individual and associated power may be so great in its effect upon public and private interest as to cease to be simply one of degree and to reach the dignity of one in kind.[5] Therefore, an act harmless when done by one may become a public wrong when done by many acting in concert, if the result is hurtful to the public or to the individual against whom the concerted action is directed.[6] When an association adopts unlawful purposes and does unlawful acts, the association itself becomes unlawful and the original good purpose of its members is not a defense.[7]

The manner in which a restraint of trade is effected is not material, for the courts do not hesitate to disregard the form

[3] *United States vs U. S. Steel Corp.*, 223 Fed. 55, 154-155 (1915); *United States vs American Linseed Co. et al.*, 275 Fed. 939, 942 (1921). See also, *United States vs New England Fish Exchange*, 258 Fed. 742, 749 (1919).

[4] *Commonwealth vs Carlisle*, Brightly (Penn.) 36, 41; *United States vs E. C. Knight Co.*, 156 U. S. 1, 35 (1895).

[5] *Martell vs White*, 185 Mass. 255, 256.

[6] *Grenada Lumber Company vs Mississippi*, 217 U. S. 433, 440 (1910); *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600, 614 (1914).

[7] *United States vs Workingmen's Amalgamated Council of New Orleans et al.*, 54 Fed. 999, 1000 (1893).

if an illegal purpose or result is shown.[8] The law is applied to any means used, whether "unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made in whole or in part by acts, words, or printed matter."[9]

The forms of combined action amounting to restraints of trade which the law condemns divide themselves into two groups,—voluntary restraints and involuntary restraints. Voluntary restraints, as the words suggest, are mutual restraints imposed by voluntary action of the parties. Involuntary restraints are those imposed upon the competition of others against their will.

Voluntary Restraints.—Voluntary restraints cover every conceivable form of competition. They range from agreements designed to eliminate entirely all competition to activities intended to control certain forms of competition. It will perhaps be more clear to discuss first those activities designed to restrain competition generally, and subsequently to outline the illegal restraints relating only to particular forms of competition.

Trusts.—As outright agreements to eliminate competition were unlawful even under the common law, the legal device known as the trust was resorted to in the early eighties to accomplish the same results. By trust agreements, stocks in competing corporations were turned over by the stockholders of such corporations to trustees who held for a fixed period for the benefit of such stockholders. The stockholders usually received trustee certificates entitling them to dividends, and the trustees were given complete management of the corporation whose stock they held. In this way, complete control of competition between such corporations was secured. Adopted originally by the Standard Oil Company of Ohio, this device became the vehicle through which some of the greatest combinations in American industrial history were organized. This method of restraining competition was held to be unlawful by state courts before the passage of the Sherman Law.[10] Its

[8] *United States vs Whiting et al.*, 212 Fed. 466, 475 (1914).

[9] *Gompers vs Buck Stove & Range Co.*, 221 U. S. 418, 438 (1911).

[10] *People vs North River Sugar Refining Co.*, 54 Hun (N. Y.) 354 (1889).

use by an unincorporated association was held to be illegal as destructive of competition.[11] The effect of these and other state decisions which went to the extent not only of holding such organizations unlawful as in restraint of trade, but also of ordering the forfeiture of the charter of a corporation a party to such a plan, quickly discouraged the use of this method.

Holding Companies.—As some of our states amended their corporation laws to permit corporations created there to hold stocks in other corporations, the holding company quickly became a popular method of attempted evasion of the anti-trust acts. By this method, the control of the competing corporations was placed not in trustees but in a corporation which held the stock of the stockholders in the various corporations participating in the plan. The officers and directors of the holding corporation, of course, by this method controlled completely the competition of all corporations participating. The use of this device between corporations for the purpose of suppressing competition between such corporations, was long ago held to be a violation of the Sherman Law.[12] The Act applies equally to the purchase of stock of one corporation by another, where domination and control of the industry and the power to suppress competition are acquired.[13] As already discussed, the Clayton Act adopted in 1914 prohibited holding companies or the holding by one corporation of stock in a competing corporation, where the effect is to lessen substantially competition between such corporations. This act, however, specifically recognizes the right of corporations to purchase stock solely for investment, or to form subsidiary corporations to carry on their business or branches thereof if the holding of such stock does not have the prohibited effect.

Merger.—The actual merging of the properties of competing concerns has also been resorted to as a means of evading the law. The Supreme Court, however, has held that any such com-

11 *State vs Nebraska Distilling Co.*, 99 Neb. 700 (1890).

12 *Northern Securities Co. vs United States*, 193 U. S. 197 (1904); *Standard Oil Co. vs United States*, 221 U. S. 1 (1911). See also, *United States vs Reading Co. et al.*, 40 Sup. Ct. Rep. 425 (1920).

13 *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 85 (1912).

bination of competing concerns, even though merged in one ownership, where such combination operates to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade, is a violation of the Act.[14]

Division of Territory.—A common method of restricting competition has been for several competitors to enter into agreements whereby the territory within which each member shall do business is fixed, each member usually being given the exclusive right to do business within his particular territory. The effect of such an agreement, if all parties in the industry are parties to it, is to give each manufacturer a complete monopoly of the trade in his territory, thus eliminating all forms of competition. Even though all concerns in the industry are not parties to such an arrangement, if participated in by enough concerns so that it substantially lessens competition within the field of their competition, such an arrangement is unquestionably unlawful.[15]

Classification of Trade.—Another method designed to deny to classes of buyers or sellers the benefits of competition is combined action to classify the trade with which the parties will deal. An association of manufacturers will agree that its members will sell only to wholesalers or only to retailers, or that its members will not sell to such classes of customers as mail order houses and large industrial users. Or an association of retailers will agree that its members will buy only from manufacturers who do not sell to wholesalers. While it is lawful for the individual trader to select the party with whom he will deal,[16] united action by members of a trade association to accomplish purposes such as these, is unlawful.[17] Such practices deprive the party to the restraint of his freedom to buy or sell to any

[14] *United States vs American Tobacco Co.*, 221 U. S. 106 (1911). But see *United States vs U. S. Steel Corp.*, 40 Sup. Ct. Rep. 293 (1920).

[15] *Addyston Pipe & Steel Co. vs United States*, 175 U. S. 221 (1899); *United States vs Cowell*, 243 Fed. 730, 733 (1917).

[16] *United States vs Colgate & Co.*, 250 U. S. 300, 307 (1919); *United States vs Trans-Missouri Freight Assn.*, 166 U. S. 290, 320 (1897); *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600, 614 (1914).

[17] See indictment, *United States vs Jones et al.* (National Coal Association), Feb. 25, 1921, pp. 26, 35, 44, 53, 62; indictment, *United States vs Mead et al.* (News Print Mfrs'. Assn.), April 12, 1917, p. 9.

class of trade and it excludes those not parties to the restraint from a field of supply which otherwise would be at least partially available to them.

Allotment of Customers.—A method of excluding a particular buyer from the benefits of any competition whatsoever is the practice sometimes adopted by sellers by which a particular customer is assigned to one seller, his competitors agreeing not to do business with such customer, or to quote him only prices higher than the prices quoted by the concern to whom the customer is allotted. Any such agreement or understanding, where it has any substantial effect upon the buyer by way of enhancing the price he must pay or in creating difficulties in procuring goods, is beyond doubt unlawful.[18] Agreements to refrain from competing for the patronage of the customers of the parties to the agreement is in practical effect an unlawful allotment of customers.[19]

Curtailment of Production or Supply.—A common practice indulged in by trade associations has been the making of various arrangements to curtail the supply. A combination of such a character, if it affects a substantial portion of the supply, is clearly opposed to public policy.[20] Any such arrangement obviously completely suppresses the competition of a portion of the production which would otherwise enter the market. The

[18] *Addyston Pipe & Steel Co. vs United States*, 175 U. S. 211, 241 (1899); *United States vs American Seating Co.* (Prudential Club) decree, Decrees and Judgments in Federal Anti-Trust Cases, p. 146; *United States vs Alphons Custodis Chimney Construction Co. et al.* (Chimney Builders' Assn.), Ind., Dec. 12, 1919, p. 4; see also, *U. S. Tobacco Co. vs American Tobacco Co.*, 163 Fed. 701, and decree in this case, Decrees and Judgments in Federal Anti-Trust Cases, p. 188; see indictment, *United States vs W. Hamilton Smith et al.* (Coal Merchants' Board of Trade), March 3, 1921, p. 8.

[19] See indictment, *United States vs Mead et al.* (News Print Mfrs'. Assn.), April 12, 1917, p. 9.

[20] *Cravens vs Carter Crume Co.*, 92 Fed. 479, 485 (1899); *Gibbs vs McNeeley*, 118 Fed. 120, 127 (1902); *Wheeler Stenzel Co. vs National Window Glass Jobbers' Assn.*, 152 Fed. 864, 871 (1907); *Coal Dealers' Assn. vs United States*, Decrees and Judgments in Federal Anti-Trust Cases, p. 77; *United States vs Mead et al., ibid*, p. 639; *United States vs American Thread Co., ibid.*, p. 453; *United States vs Mead et al.*, indictment April 12, 1917, p. 9.

enhancement of prices to the public is an inevitable result. Any method by which such curtailment is procured is unlawful. Thus, the restriction of production by the use of a common selling agency;[21] or by agreement between employers and their workmen;[22] or by fomenting and financing strikes among employees;[23] or by the destruction of materials already produced;[24] or the securing of priority orders from governmental agencies whereby the production is diverted from its natural territory thereby creating an artificial shortage;[25] are all objectionable.

Usually supplementary, though often employed separately, are many methods and practices designed to restrict or eliminate some particular form of competition.

Restrictions on Price Competition.—As price is usually a more important consideration to the buyer and seller than service, terms, or sometimes even quality, it is natural that the most common form of restraint of trade is that designed to restrict competition in price.

Agreements Fixing Price.—From time immemorial sellers in the market have entered into agreements and understandings as to the price of their products. Long before the adoption of the Sherman Law, such agreements were held unlawful. Such agreements are of course unlawful under the Sherman Law.[26] It is difficult to conceive of any agreement among any substan-

[21] *O'Halloran vs American Sea Green Slate Co. et al.*, 207 Fed. 187, 188 (1913); *United States vs General Paper Co.*, Decrees and Judgments, Federal Anti-Trust Cases, p. 77.

[22] *United States vs Jones et al.*, indictment, Feb. 25, 1921.

[23] *Ibid.*, p. 24.

[24] *United States vs American Coal Products Co.*, Decrees and Judgments, Federal Anti-Trust Cases, p. 464.

[25] *United States vs Jones et al.*, indictment Feb. 25, 1921.

[26] *Thomsen vs Union Castle Mail S. S. Co. et al.*, 166 Fed. 251, 253 (1908); *United States vs Jellico Mountain Coal & Coke Co. et al.*, 46 Fed. 432, 434 (1891); *Loder vs Jayne*, 142 Fed. 1010, 1014 (1906); indictment, *United States vs M. Piowaty & Sons et al.* (National Onion Assn.,) May 24, 1917, p. 20; indictment, *United States vs Jensen Creamery Co. et al.*, Feb. 24, 1917, p. 19; *United States vs Alphons Custodis Chimney Construction Co. et al.* (Chimney Builders' Assn.), Dec. 12, 1919, p. 4; indictment, *United States vs Chicago Mosaic & Tiling Co. et al.* (Chicago Mantel & Tile Contractors' Assn.), May 5, 1917, p. 10.

tial number of sellers arbitrarily fixing prices which is not a violation of the law. Whether or not the price fixed by such an agreement or combination is reasonable is wholly immaterial.[27] The courts could not base their decision as to the reasonableness of any such restraint on such a basis, as they would thereby develop a judicial system of price fixing. In any price-fixing agreement, the restraint on price competition is complete and therefore unlawful. This does not, however, mean that an agreement may not be entered into limiting the period of competition in price to a reasonable number of hours constituting a reasonable business day.[28] The fact that an agreement affects prices does not of itself make it necessarily unlawful.[29]

Agreements Affecting Price.—In an effort to avoid the appearance of price control, various devices designed to increase the general level of prices have been utilized, the legality of which is very questionable. It would appear that any agreement or arrangement which directly affects only a part of the price, if it enhances or affects the general level of prices is against public policy.[30] An agreement fixing margins of profit can be nearly as effective in stifling competition in price as a direct price-fixing agreement.[31] An understanding establishing a basis of uniform costs, when as a matter of fact the actual costs of the individual parties to the agreement vary, is clearly prejudicial in its effect upon the public and consequently against public policy.[32] A conspiracy or agreement among the members of an association to refrain from selling at prices decidedly below prevailing prices is against public policy.[33] Any under-

[27] *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 88 (1912); *C. & O. Fuel Co. vs United States*, 115 Fed. 610, 623 (1902).

[28] *Board of Trade of Chicago vs United States*, 246 U. S. 231 (1917).

[29] *United States vs Whiting et al.*, 212 Fed. 474 (1914)

[30] *Addyston Pipe & Steel Co. vs United States*, 175 U. S. 211, 237.

[31] See indictment, *United States vs Alphons Custodis Chimney Construction Co.* (Chimney Builders' Assn.), Dec. 12, 1919, p. 5.

[32] Consent decree, *United States vs Kluge et al.* (Woven Label Mfrs.' Assn.), Decrees and Judgments in Federal Anti-Trust Cases, p. 633; indictment, *United States vs Jones et al.* (National Coal Assn.), Feb. 25, 1921, pp. 21, 30, 39, 48, 57.

[33] Indictment, *United States vs W. Hamilton Smith et al.* (Coal Merchants' Board of Trade), March 3, 1921, p. 6.

standing between trade association members, or between them and manufacturers, to maintain the resale prices fixed by manufacturers on their own commodity, is unlawful.[34]

The action of a trade association in transferring orders or contracts to new concerns in the industry on condition that they should not compete, thereby maintaining the existing price level, is objectionable.[35]

Fictitious Bids or Sales.—Several associations are alleged to have engaged in fictitious bids or sales, variously designated as "assisting" or "straw bids" or "washed sales," as a means of deceiving parties as to the price at which their commodity is being sold and effecting an artificial enhancement or depression of price. Such agreements have been enjoined as against public policy.[36]

False Statements Designed to Affect Prices.—In two recent indictments, the government alleges as a violation of the law the action of trade associations in making alleged false statements as to shortages of supply or increased costs.[37] Such concerted action by competitors designed to deceive the public and create panic markets, thus enhancing prices, may violate the law, particularly if accompanied by other acts designed to restrict competition.

Pools.—For many years the elimination of price competition has been sought through varying pooling devices by trade asso-

[34] *Dr. Miles Medical Co. vs John D. Parks & Sons Co.*, 220 U. S. 373 (1911); *Straus vs American Publishers' Assn.*, 231 U. S. 222 (1913); *United States vs Schraeder's Son, Inc.*, 252 U. S. 85 (1920). Such agreements or coöperative arrangements also violate the Federal Trade Commission Act, *Federal Trade Commission vs Beech-Nut Packing Co.*, 42 Sup. Court Rep., 150 (1922).

[35] *United States vs Mead et al.* (News Print Mfrs'. Assn.), indictment April 12, 1917, p. 9.

[36] *United States vs American Seating Co. et al.* (Prudential Club), Decrees and Judgments in Federal Anti-Trust Cases, p. 146; *United States vs Chicago Butter & Egg Board, ibid.*, p. 261; *United States vs Elgin Board of Trade, ibid.*, p. 402; see also indictment, *United States vs Jones et al.* (National Coal Assn.), Feb. 25, 1921, pp. 26, 35, 44, 53, 62.

[37] *United States vs Mead et al.* (News Print Mfrs'. Assn.), indictment April 12, 1917, p. 9; *United States vs Jones et al.* (National Coal Assn.), indictment Feb. 25, 1921, pp. 27, 36, 45, 54, 62.

ciations. Receipts, or a portion of receipts, or bonuses paid for the allotment of customers to the individual manufacturers were paid into a common pool and divided at a subsequent date, usually on a basis of the relative production of the parties to the pool at the time the agreement was made. Such agreements were held unlawful at the common law even before the passage of the Sherman Act.[38] The competitive system of industry compels traders out of self-interest to offer price inducements to attract a larger volume of trade, but under a pooling agreement a concern assured of all its share of the entire profits of the industry, has no incentive to compete in price, and the tendency of such agreements is, therefore, not only to restrict competition but to destroy it.[39]

Open Price Associations.—During recent years a large number of associations have collected, and secretly distributed among their members, data showing the current prices of their members. In most instances such prices have been prices on transactions just completed; in other instances the prevailing quotations have been distributed. So long as the price information on past transactions is distributed, without any recommendations by the association officials, such action is probably lawful.[40] The Attorney General of the United States does not deem such an activity as unlawful unless its purpose or effect is to curtail production, enhance prices, or suppress competition.[41] But when such an activity goes beyond the mere interchange of facts, and includes frequent meetings, the analysis of such facts, and recommendations by association officials, the interchange of opinions between members as to the future markets and similar

[38] *Emery et al. vs Ohio Candle Co.* (Candle Mfrs'. Assn.), 47 Ohio State 320 (1890); *Stanton vs Allen,* 89 Ky. 375 (1889).

[39] *United States vs Trans-Missouri Freight Assn.,* 58 Fed. 58, 65, 66 (1893); *Addyston Pipe & Steel Co. vs United States,* 175 U. S. 211 (1899); *Continental Wall Paper Co. vs Louis Voight & Son Co.,* 212 U. S. 227 (1907); *Lee Line Steamers vs Memphis H. & R. Packet Co.,* 277 Fed. 5, 8 (1922); see decree, *United States vs Great Lakes Towing Co.,* Decrees and Judgments in Federal Anti-Trust Cases, p. 255.

[40] See *United States vs American Linseed Co. et al.,* 275 Fed. 939 (1921).

[41] Letter, H. M. Daugherty, Attorney General, to Herbert Hoover, Secretary of Commerce, Feb. 8, 1922. See Appendix J.

acts, it is unlawful.[42] For a fuller discussion of this subject, see Chapter IV, p. 58. In several recent civil and criminal proceedings of the government the employment of open price plans as part of a general scheme to restrain trade has been alleged.[43] The instant the interchange of price information goes beyond its proper function of furnishing information and is employed as the means for making effective even a tacit agreement to enhance prices, it becomes colored with illegality. In the present state of the law the interchange of price data by association members is dangerous.

Common Selling Agency.—Another old scheme to control price and competition was the creation of common marketing organizations for a group of sellers. By distributing their products solely through such an agency, competitors owning a pro rata interest in the common agency or marketing company could as effectively control competition as by direct agreement. In a number of early common law cases, the courts held such arrangements to be against public policy and in restraint of trade.[44]

Under the Sherman Law, a common selling agency or common distributing organization operated by a trade association or other group of competitors, which is given the power to fix prices or control production of the parties employing or interested in it, and which has the effect of restricting competition in interstate commerce in any substantial degree, is unlawful.[45] The test of legality centers about the power of any such organi-

[42] *American Column and Lumber Co. et al. vs United States,* 42 Sup. Ct. Rep. 114 (1921).

[43] Indictment, *United States vs Alphons Custodis Chimney Construction Co. et al.,* Dec. 12, 1919, pp. 5, 6; indictment, *United States vs American Terra Cotta & Ceramic Co. et al.,* Sept. 28, 1921, p. 12; petition, *United States vs Cement Mfrs'. Protective Assn.,* June, 1921, p. 22.

[44] *Morris Run Coal Co. vs Barclay Coal Co.,* 68 Pa. St. 173 (1871); *Slaughter vs Thacker Coal & Coke Co.,* 55 W. Va. 642 (1904); *Central Ohio Salt Co. vs Guthrie,* 35 Ohio St. 666 (1880).

[45] *O'Halloran vs Sea Green Slate Co.,* 207 Fed. 187, 190 (1913); *United States vs Chesapeake & Ohio Fuel Co.* (C. & O. Coal Association), 105 Fed. 93, 104 (1900); decree, *United States vs General Paper Co.,* Decrees and Judgments in Federal Anti-Trust Cases, p. 77; decree, *United States vs American Tobacco Co., ibid.,* p. 189; decree, *United States vs*

zation to exercise a large influence on substantial markets in regulating supply and price.[46] If the price or supply of the product is or may be affected to a substantial extent to the disadvantage of producers or purchasers, thereby operating in a material degree to the injury of the public, the agency by which such result is secured is unlawful.[47]

Patents.—Early in the administration of the Sherman Law, efforts were made to control prices through the medium of patents. But the grant of a patent does not "give the right to sell indulgences to violate the law."[48] The only effect of a patent is to restrain others from manufacturing, selling or using what the patentee has invented.[49] The moment, therefore, the inventor puts patented articles into the channels of commerce, he subjects such property to the laws which control commercial transactions.[50] The acquirement of patents, so long as they are not competitive and such acquirement does not in any practical or large sense remove competition, is not a restraint of trade.[51] When a new invention threatens the destruction of a concern working with antiquated processes or machinery, it is probably not unlawful to acquire the patent covering it as a means of self-protection.[52] The acquirement, however, of basic patents directly competitive for the purpose or with the effect of substantially lessening competition or acquiring a monopoly, would clearly violate the law. To legalize such action merely because each of the original patentees had a monopoly, would be to per-

DuPont de Nemours Co., ibid., p. 204; decree, *United States vs Union Pacific R. R. Co., ibid.*, p. 215; see also, *United States vs International Harvester Co.*, 214 Fed. 987 (1914); indictment, *United States vs Algoma Coal & Coke Co. et al.*, March 5, 1917, p. 6.

46 *United States vs Chesapeake & Ohio Fuel Co.* (C. & O. Fuel Association), 105 Fed. 93, 104 (1900).

47 *United States vs Whiting*, 212 Fed. 466, 475 (1914); *United States vs Mead et al.* (News Print Mfrs'. Assn.), indictment April 12, 1917.

48 *United States vs Standard Sanitary Mfg. Co.* (Sanitary Enameled Ware Assn.), 191 Fed. 172, 190 (1911).

49 *Motion Picture Co. vs Universal Film Co.*, 243 U. S. 502, 510 (1917); Paper Bag Patent Case, 210 U. S. 424, 425 (1908).

50 *Missouri vs Bell Telephone Co.*, 23 Fed. 539, 540 (1885).

51 *United States vs United Shoe Machinery Corp.*, 247 U. S. 32, 44, 54 (1918).

52 *Ibid.*, p. 53.

vert the patent laws.[53] The patent laws do not confer any right to make, vend and use the subject matter of an invention, for that is a natural right already possessed by the inventor; their effect is merely to take away for the period of the patent from all others than the patentee the right to make, vend and use the patented article, and to give to the patentee the aid of the law in enforcing this prohibition on others.[54] The patentee thus has a legal monopoly so far only as the patented article is concerned. The right to exclude others from making or selling the article does not enlarge his natural right to make, sell or use, which the producer or owner of any article has, and when he sells the article he cannot impose illegal restrictions of any kind on its use or fix the price at which it shall be resold.[55] A restraint which is co-extensive only with the field of exclusive control or monopoly granted to the patentee is lawful.[56] But if any contract entered into by him is beyond the scope of the field of trade belonging to him by reason of his patent right, and is designed to unfairly restrain the rights of others in a field outside the scope of the patent or to control the competition of others in this outside field, by mutual agreement through the guise of a patent, it runs counter to the law.[57] But the acquirement of patents for improvements on the original patented article or the pooling of ownership by the original patentee and the owners of patents covering such improvements, would not be a violation of law, for such a relationship would have as its purpose a normal and proper protection of the patent rights rather than a restraint upon competition.[58] There is no doubt, too, that an owner of the patent can assign it or sell the right to manufacture and sell the articles patented upon the condition that the assignee or licensee shall charge a certain price for the

[53] *United States vs Motion Picture Patent Co. et al.*, 225 Fed. 800, 810 (1915); *National Harrow Co. vs Hench*, 76 Fed. 667, 670 (1896).

[54] *United States vs Motion Picture Co.*, 225 Fed. 800, 804 (1915).

[55] *Bauer & Cie. vs O'Donnell*, 229 U. S. 1 (1913); *Straus et al. vs Victor Talking Machine Co.*, 243 U. S. 490 (1917).

[56] *Bement vs Harrow Co.*, 186 U. S. 70 (1902); *United States vs Standard Sanitary Co.*, 226 U. S. 20 (1912).

[57] *United States vs Motion Picture Co.*, 225 Fed. 800, 806 (1915).

[58] *United States vs Motion Picture Patent Co.*, 225 Fed. 800, 810 (1915).

article.[59] But the instant such right is employed not to protect the use of a patent and the individual monopoly accorded the patentee by law, but rather to control competition and price through the subterfuge of license agreements, the law is violated.[60] The Supreme Court emphatically declares that a patent cannot confer immunity or the law be evaded by any other disguise or subterfuge of form. Agreements among independent owners of patents to fix the price of their patented articles would unquestionably be unlawful, for such a restraint arises from the combination rather than from the exercise of rights granted by letters patent.[61]

Copyrights.—The monopoly granted by a copyright is no more extensive than the monopoly secured under the patent law, and consequently the principles above stated in general also apply to copyrights. The copyright statutes do not in any way authorize agreements in restraint of trade or any other acts in violation of the anti-trust laws.[62]

Corner.—A corner consists in acquiring control of all or a dominant portion of a commodity with the purpose of artificially enhancing prices, one of its features being the purchase for future delivery, coupled with a withholding from sale for a limited time. The term is broad enough to include modified modes of obtaining substantially the same end.[63] Parties thus control-

[59] *Bement vs National Harrow Co.*, 186 U. S. 70, 93 (1902).

[60] *National Harrow Co. vs Hench*, 76 Fed. 667, 669; *Standard Sanitary Mfg. Co. vs United States* (Assn. of Sanitary Enameled Ware Mfrs.), 226 U. S. 20, 48 (1912); *National Harrow Co. vs Quick*, 67 Fed. 130, 131 (1895). See also *United States vs Krentzler Arnold Hinge Last Co. et al.* (The Cary Club), consent decree, Decrees and Judgments in Federal Anti-Trust Cases, p. 410; *United States vs New Departure Mfg. Co. et al.* (Assn. of Coaster Brake Licensees), consent decree, *ibid.*, p. 475.

[61] *Blount Mfg. Co. vs Yale & Towne Mfg. Co.*, 176 Fed. 555, 557, 562 (1909); *National Harrow Co. vs Hench*, 83 Fed. 36, 38 (1897); *Bobbs Merrill Co. vs Straus*, 139 Fed. 155, 192 (1905); *United States vs Dische et al.* (Auto Bumper Assn.), consent decree, Decrees and Judgments in Federal Anti-Trust Cases, p. 647.

[62] *Straus vs American Publishers' Assn.*, 231 U. S. 222, 234 (1913); *Mines vs Scribner et al.* (American Publishers' Assn.), 147 Fed. 927 (1906).

[63] *United States vs Patten*, 226 U. S. 525, 537 (1913).

ling the supply can make contracts with others for the delivery of more than the available supply, and by holding both the supply and such contracts in their possession until the demand has overrun the supply, can advance the price abnormally. A corner is a forbidden restraint of trade, for while it may temporarily stimulate competition, it also thwarts the usual operation of the laws of supply and demand, withdraws the commodity from the normal currents of trade, enhances the price artificially, hampers users and consumers in satisfying their needs, and produces substantially the same evils as does any combination substantially suppressing competition.[64]

Monopoly.—The prohibition against monopoly or attempts to create monopolies has already been discussed. While the recent decisions of the Supreme Court have raised a doubt as to whether or not a monopoly acquired by a single concern by normal and lawful methods is prohibited by law, there is no question that a monopoly of a product procured through joint action is unlawful. Action by a trade association which is designed to or which has the effect of excluding others from the trade so as to confine the trade to the members of such association, is unlawful.[65] This does not of course mean that a trade association may not with perfect propriety have within its membership all the concerns in the industry, but it must take no action designed to exclude or prevent any person from engaging in the business if he so desires, whether or not he cares to be a member of the association.

Generally buying has been more nearly on a competitive basis than selling. Combinations of buyers have not so much directed their effort at control of price or other voluntary restraints as at the control of the channels through which the distribution of the commodities should move. While the fact that buyers' combinations may tend to lower prices to the public, may be a factor not present in selling combinations, nevertheless the law in its effort to maintain the natural operation of supply

[64] *United States vs Patten*, 226 U. S. 525, 542 (1913).

[65] *Lowry vs Tile, Mantel & Grate Assn. of California et al.*, 106 Fed. 38, 46 (1900); *United States vs Jellico Mountain Coal & Coke Co. et al.* (Nashville Coal Exchange), 46 Fed. 432, 434 (1891).

and demand frowns on any substantial price control by buyers.[66]

Coöperative Buying Organizations.—At common law, it was early held that a combination of buyers giving them a control of the market, thus enabling them to paralyze the production, limit the supply and enhance the price to the public if they so desired, was against public policy, even though the alleged purpose was to reduce the price.[67] The common law did not object to combinations of purchasers otherwise unable to buy whose united entry into the market would enhance competition, but only to those combinations where the agreement not to bid against each other was the foundation for united action.[68]

The Sherman Law decisions have upheld the right of the sellers to have the benefit of competition among buyers just as buyers demand such competition among sellers. While it is not within the power of the courts to compel buyers to compete, they can be forbidden to make agreements not to compete.[69] Thus agreements of buyers fixing the price at which they shall buy are unlawful, even in the absence of any unlawful intent, if far-reaching enough to substantially alter the general conditions under which persons engaged in the particular trade in such territory do business, that is, if they are of such character that their effect is or may be to affect the price or supply to a substantial extent or to operate otherwise to the disadvantage of sellers and of the public. The substantiality of the effect will be determined by the facts of each situation, for a limited market or for one nicely balanced as between buyers and sellers, might be greatly disrupted by an agreement between only a few buyers while a broader market might not be unfairly affected by a combination of a considerable number of persons involving a large amount of goods.[70] If the effect is illegal, the means of accomplishment is immaterial, whether through direct agreement,

[66] *United States vs Whiting*, 212 Fed. 466 (1914); *Hood Rubber Co. vs United States Rubber Co.*, 229 Fed. 583, 588, 589 (1916).

[67] *People vs Milk Exchange*, 145 N. Y. 267 (1895); *Chapin vs Brown Bros.*, 83 Iowa 156 (1891).

[68] *National Bank of the Metropolis vs Sprague et al.*, 20 N. J. Equity 159 (1869).

[69] *Swift & Co. vs United States*, 196 U. S. 375, 399 (1905).

[70] *U. S. vs Whiting*, 212 Fed. 466, 476 (1914).

joint agent, or what not. In the American Tobacco Company decree, each of the fourteen corporations among which, by the decree, the business of the parent company was divided, was enjoined for a period of five years from employing a common agent for the purchase of leaf tobacco or other raw material.[71] The mere fact that a price fixed by agreement of buyers is not unreasonable is, of course, no defense.[72]

Agreements to Refrain from Bidding.—Agreements to refrain from making bids are likewise unlawful. In the meat packer case, the respondents were enjoined from directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock.[73] The action of the members of a fish exchange in splitting trips, that is, one member purchasing a trip of fish at auction to be divided with other dealers refraining from bidding, has been held to be unlawful unless there was no agreement to refrain from bidding and the splitting of the purchase had been arranged for after the purchase had been made.[74] Criminal proceedings have been successfully prosecuted against the members of a trade association for the fixing of a price at which they would buy and agreeing to refrain from purchasing except at or below such price.[75] In the Onion Association case, one of the allegations in the indictment was also that the association divided producing regions into separate territories, assigning a territory to certain members, other members refraining from bidding in such territory.[76]

Restraints on Competition in Terms.—Generally speaking, competition in terms is not of such great public importance as competition in price. The government has in no case instituted action against a trade association where its activities were confined solely to fixing uniform terms, but in many cases the fixing

[71] Decrees and Judgments in Federal Anti-Trust Cases, p. 189.

[72] *United States vs Whiting,* 212 Fed. 466, 477 (1914).

[73] Decrees and Judgments in Federal Anti-Trust Cases, p. 64.

[74] *United States vs New England Fish Exchange,* 258 Fed. 732, 750 (1919).

[75] *United States vs M. Piowaty & Son et al.* (National Onion Assn.), May 24, 1917, p. 13; see also consent decree, *United States vs Elgin Board of Trade,* Decrees and Judgments in Federal Anti-Trust Cases, p. 402.

[76] *United States vs M. Piowaty & Son et al.* (National Onion Assn.), indictment May 24, 1917, p. 12.

of uniform terms has been enjoined as a violation of the law in connection with other practices amounting to a general scheme to restrain trade. In the American Tobacco Company case and in the Powder Case, the defendants were enjoined from making agreements, express or implied, relative to the terms of purchase of products dealt in by them which would have the effect of restraining trade.[77] In several criminal proceedings against trade association members' united action with reference to the fixing of rates of interest on open accounts, the post dating of bills, the methods of handling telephone and telegraph charges, have been alleged as means whereby the alleged violation of the law was accomplished.[78] There can be no doubt that competition in terms may become a very important form of competition. The Commissioner of Corporations, in a report to Congress, alleged that the use of long credits by the International Harvester Company was an important factor enabling that company to wrest trade from its rivals.[79] Terms to-day in Europe are if anything a greater consideration than price. In South America long-term credits are essential to the sale of the goods. In an industry where by the nature of the commodity a standard price has been established, competition in terms may be substantial. In industries to-day where the terms of credit, discounts and so on are of substantial importance, action by a trade association representing a substantial portion of the industry fixing such terms on a uniform basis, thereby eliminating this form of com-

[77] *United States vs American Tobacco Co.*, Decrees and Judgments in Federal Anti-Trust Cases, p. 188; *United States vs DuPont de Nemours & Co.*, *ibid.*, p. 202; in the following consent decrees in association cases, the fixing by mutual agreement of the terms and conditions of sale was enjoined: *United States vs New Departure Mfg. Co. et al.* (Assn. of Coaster Brake Licensees), Decrees and Judgments in Federal Anti-Trust Cases, p. 474; *United States vs Kluge et al.* (Woven Label Mfrs'. Assn.), *ibid.*, p. 633; *United States vs Mead et al.* (News Print Mfrs'. Assn.), *ibid.*, p. 638; *United States vs Discher et al.* (Automobile Bumper Assn.), *ibid.*, p. 647. See also Chap. XI, p. 183.

[78] *United States vs Webster et al.* (National Assn. of Auto Accessories Jobbers), indictment Aug. 30, 1917, pp. 12-16; *United States vs M. Piowaty & Son et al.* (National Onion Assn.), May 24, 1917, p. 11; *United States vs Mead et al.* (News Print Mfrs'. Assn.), indictment April 12, 1917, p. 9.

[79] Report of Commissioner of Corporations on International Harvester Co., pp. 287, 288.

petition, is dangerous, particularly if employed in connection with any other practice of dubious legality.

Restraints on Competition in Service.—Competition in service takes many forms, varying from free delivery of goods to the furnishing of specialty salesmen to assist the distributor in procuring a satisfactory distribution. Its importance as a form of competition to be preserved was early recognized by the courts in the enforcement of the Sherman Law.[80] The public demands special service in the way of delivery, sanitary packages, free repairs, and so on. Combinations which tend toward the elimination of service, for example in the transportation of freight or in the adjustment of claims, are improper.[81] Thus agreements to refrain from competing in the furnishing of storage for goods sold and not delivered, the payment or allowance for cartage and the like, have been alleged as violations of the law.[82] In the meat case, the packers were enjoined from employing uniform charges for cartage in the delivery of meats where the effect of such action was to restrict competition, but no such agreements were prohibited where such charges were not calculated to have any effect on competition in the sale and delivery of meats.[83]

Restraints of Competition in Quality.—Concerted action to impair the quality of a product so that the old price buys an inferior article, results in public injury in violation of the law.[84] In the news print case, one of the allegations in the indictment was that the members of the association were refraining from competition with each other as to the quality of paper to be sold.[85]

[80] *United States vs Trans-Missouri Freight Assn.*, 53 Fed. 440, 452 (1892).

[81] *United States vs Union Pacific R. R. Co.*, 226 U. S. 61, 87, 88 (1912); *United States vs Terminal R. R. Assn.*, 224 U. S. 383, 393 (1912); see also, *United States vs Corn Products Co.*, 234 Fed. 964, 1012 (1916).

[82] *United States vs Mead et al.* (News Print Mfrs'. Assn.), indictment April 12, 1917, p. 7.

[83] Decrees and Judgments in Federal Anti-Trust Cases, p. 65.

[84] *United States vs Keystone Watch Case Co.*, 218 Fed. 502, 518 (1915).

[85] *United States vs Mead et al.* (News Print Mfrs'. Assn.), indictment April 12, 1917, p. 9.

Involuntary Restraints.—When we come to the numerous practices designed to impose restraints upon competitors against their will, a stricter rule applies. Parties may voluntarily agree to restrict their own competition so long as the restriction is not so substantial as to harm the public interests; but the instant they take action designed to unduly hinder a competitor, the prohibition of the law applies, for the established policy of this country is to preserve to every citizen a free unrestricted opportunity to engage in business. The only safe policy for the business man is, therefore, to engage in no concerted action with others designed to injure a competitor. It is rare indeed that a party engaging in an involuntary restraint is not aware of the injury to his competitor, which is largely if not entirely the purpose of the restraint.

Control of Channels of Distribution.—By far the most common form of restraint directed at competitors, so far as trade association activities are concerned, is the attempted control of the channels of distribution. Such restraints usually take one of two forms,—either an attempt to compel the exclusive use of one method of distribution, as, for example, through wholesalers, or attempts on the part of some group or association in the industry to compel the distribution of the products of the industry solely through that group, even though it represents only a part of that branch of the industry. Associations of distributors acting sometimes alone, sometimes in coöperation with associations of manufacturers, attempt to dictate and control the agencies through which the commodities of an industry shall move as they flow through the channels of interstate commerce from the manufacturer or producer to the ultimate consumer. Retailers have endeavored to prevent sales by manufacturers and wholesalers to mail order houses, contractors, large industrial users or consumers. Wholesalers have endeavored to compel manufacturers to distribute through the wholesaler rather than direct to the retailer. All such efforts to artificially control the natural flow of commerce in an article, and to hinder and restrict the common liberty to engage in business, are unlawful.[86]

[86] *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600 (1914). Such activities also violate the Federal Trade Commis-

In one of the earliest association cases before the Supreme Court it was held that the constitution and by-laws of an association consisting of manufacturers and retailers which provided that the dealers should neither purchase from manufacturers not members of the association, nor sell to any dealer not a member of the association, for less than the list price, which was 50 per cent higher than the price to members, and providing that the manufacturers who were members would sell to no one not a member of the association, was an unlawful restraint of trade because it narrowed the market for the sale of tiles in California to other manufacturers and distributors as well as enhanced the price to dealers not members of the Association.[87] Similarly the rules of a fish exchange that members doing a commission business should not sell to retailers and should offer for sale each day on the exchange any fish which had been sold or assigned to them for sale from other ports, was held an unreasonable restraint.[88] One of the earliest Sherman Law cases held that the requirement of a coal exchange that mine operators should not sell to parties not members of the exchange was unlawful.[89]

In numerous association cases, the members of associations of retailers have been enjoined from engaging in any form of united action, either persuasive or coercive, designed to compel manufacturers or wholesalers to refrain from selling to parties other than members of the association, such as consumers or dealers not recognized by them as regular dealers.[90]

sion Act: *National Harness Mfrs'. Assn. vs Federal Trade Commission,* 268 Fed. 705 (1920); *Wholesale Grocers' Assn. of El Paso vs Federal Trade Commission,* 277 Fed. 657; *California Wholesale Grocery Co. et al. vs Federal Trade Commission,* 275 Fed. 725 (1921).

[87] *Montague vs Lowry* (Tile, Mantel & Grate Assn. of California), 193 U. S. 38, 45 (1904).

[88] *United States vs New England Fish Exchange,* 258 Fed. 732, 749 (1919).

[89] *United States vs Jellico Mountain Coal & Coke Co.,* 46 Fed. 432, 434 (1891).

[90] *United States vs Associated Bill Posters & Distributors,* Decrees and Judgments in Federal Anti-Trust Cases, p. 373; *United States vs Hollis* (Northwestern Lumbermen's Assn.), *ibid.,* pp. 619, 627; *United States vs Nome Retail Grocers' Assn., ibid.,* p. 87; *United States vs Na-*

Similarly, associations of wholesalers have been enjoined from endeavoring to force or dissuade manufacturers from selling to parties not members of the association, or parties not recognized by the association as wholesalers, or to retail stores, department stores, mail order houses, purchasing syndicates, and other distributors.[91]

Some of the members of one association were indicted and convicted for their efforts to restrict the retail distribution of tiles in their vicinity solely to the members of the association.[92] The action of a group of retail lumber dealers in one city in refusing to sell any consumer or user of lumber purchasing from outside sources unless the consumer paid to the combination the difference in the price he paid for lumber so bought from others and the price charged therefor by the local dealers, and further agreed to purchase from them exclusively thereafter, was early in the administration of the Sherman Act held to be an unlawful restraint.[93] Among the allegations in the proceeding brought against the members of the National Coal Association is the charge that the members of that association in concert refused to sell coal to consumers wherever local coal dealers objected to such direct sales and refused to sell to coal dealers who were not members of retail coal dealers' associations doing business in accordance with the rules and regulations of such association.[94]

tional Assn. of Master Plumbers, consent decree, *ibid.,* p. 614; *United States vs Colorado & Wyoming Lumber Dealers' Assn.,* consent decree, *ibid.,* p. 669; *United States vs Hartwick et al.* (Michigan Retail Lumber Dealers' Assn.), consent decree, *ibid.,* p. 659; *United States vs Master Horse Shoers' National Protective Assn.,* consent decree, *ibid.,* p. 390.

[91] *United States vs Philadelphia Jobbing Confectionery Assn.,* Decrees and Judgments in Federal Anti-Trust Cases, p. 398; *United States vs National Wholesale Jewelers' Assn.,* consent decree, *ibid.,* p. 521; *United States vs Southern Wholesale Grocers' Assn.,* consent decree, *ibid.,* p. 248; *United States vs Pacific Coast Plumbing Supply Assn.,* consent decree, *ibid.,* p. 326.

[92] *United States vs Belfi* (Philadelphia Mantel, Tile & Grate Assn.), indictment Dec. 6, 1917. See also, *United States vs National Retail Monument Dealers' Assn.,* indictment July 24, 1917, p. 5.

[93] *Ellis vs Inman Poulsen Lumber Co.,* 131 Fed. 182, 188 (1904).

[94] *United States vs Jones et al.* (National Coal Assn.), indictment Feb. 25, 1921, p. 26.

Agreements between associations of manufacturers and wholesalers, for example, whereby the manufacturers agree to sell only through the members of the wholesale association and the wholesalers agree to buy only through the manufacturers' association, partake both of the nature of voluntary and involuntary restraint and are of course unquestionably unlawful.[95] An agreement by the members of a bill posters' association to display on their boards the posters of only such advertisers as limited their patronage to members of the association, and to exclude from their boards advertisers who patronized any competing bill posters not members of the association, has been held illegal for the reason that the whole spirit and policy of the law is opposed to agreements designed to exclude other persons from legitimate commerce.[96] A combination of three associations of manufacturers, wholesalers and retailers respectively, restricting the sale of proprietary articles solely through those who conducted their business in accordance with arbitrary standards of price is unlawful.[97]

Often used as means to control the channels of distribution, but sometimes used for lesser restraints such as the elimination of individual competitors, are various methods which the law condemns. They range all the way from black lists to libel, from boycotts to espionage, comprising a list which is steadily increasing but to all of which the test of reasonableness applies.

Boycotts and Blacklists.—One of the most common means employed by associations to control the channels of distribution or otherwise restrain trade has been the boycott. Boycotts take the form of concerted measures either to refrain from selling to or buying from specified parties. Concerted action by members of a trade association representing the greater part of an industry is a powerful weapon of coercion which an individual manufacturer or dealer cannot successfully combat. Its use tends to restrict the freedom of commerce in various ways. It always, of course, restricts the market, making it more difficult

[95] *Montague vs Lowry,* 193 U. S. 38 (1904).

[96] *United States vs Associated Bill Posters et al.,* 235 Fed. 540 (1916).

[97] *Loder vs Jayne et al.* (Proprietary Assn. of America: National Wholesale Druggists: National Assn. of Retail Druggists), 142 Fed. 1010 (1906), 149 Fed. 21 (1916).

for a boycotted party to buy or sell as the case may be. It may also force the boycotted party to refrain from competition with the parties to the boycott, for example, preventing a manufacturer from selling directly to retailers in competition with wholesalers selling to the same class of trade. Boycotts are opposed to the public policy embodied in the anti-trust statutes and are generally held to be unlawful.[98]

Indictments have been returned against members of several associations for alleged boycotts.[99] There may be some circumstances under which an association may take action closely approaching a boycott, as, for example, the exchange of credit information.[100] Any action by an association to compel nonmembers to boycott third parties under threat of boycott by members of the association is always illegal.[101] Members of an association have been indicted and some of them convicted for concerted action to induce a labor union to refuse to set tiles for manufacturers selling through so-called irregular channels.[102]

Blacklists.—Probably the most common means used to effect boycotts has been the blacklist. The blacklist usually takes the form of notices circulated among prospective buyers from or sellers to the person to be boycotted, giving the name of the

[98] *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600, 612 (1914); *Sullivan vs Associated Bill Posters & Distributors of the United States*, 272 Fed. 323, 327 (1919); *United States vs Jellico Mountain Coal & Coke Co.* (Nashville Coal Exchange), 46 Fed. 432, 434 (1891); *United States vs King* (Aroostook Potato Shippers' Assn.), 229 Fed. 275, 279 (1915); *United States vs Hollis et al.* (Northwestern Lumbermen's Assn.), not reported, 6 Fed. Anti-Trust Decisions, 976 (1917); *Mines vs Scribner*, 147 Fed. 927, 928 (1906); *Straus vs American Publishers' Assn.*, 231 U. S. 222, 236 (1913); *Loder vs Jayne* (Proprietary Assn. of America: National Wholesale Druggists' Assn.: National Assn. of Retail Druggists), 149 Fed. 21, 28 (1906).

[99] *United States vs National Retail Monument Dealers' Assn. et al.*, indictment July 24, 1917, p. 5; *United States vs Poster Advertising Assn., Inc. et al.*, indictment Jan. 26, 1921, p. 5; *United States vs Chicago Mosaic & Tiling Co. et al.*, indictment May 5, 1917, p. 6.

[100] *United States vs King et al.* (Aroostook Potato Shippers' Assn.), 229 Fed. 275, 278 (1915). See also Chap. XI.

[101] *United States vs King et al.*, supra, pp. 279, 280.

[102] *United States vs Belfi et al.* (Philadelphia Mantel, Tile & Grate Assn.), indictment Dec. 6, 1917, p. 7.

party as a person with whom no dealings should be had. The circulation of blacklists has been enjoined in numerous trade association cases.[103] When a trader conspires with others of like purpose to obstruct the free and natural course of interstate commerce and to unduly suppress competition by placing competitors or others under the coercive influence of a blacklist circulated among actual or possible customers of the offender, he exceeds the personal rights granted to him under our system of government and comes within the condemnation of the Anti-Trust Act.[104] It is immaterial whether the blacklist is circulated by the association or such information furnished by it to a trade paper for circulation or its distribution secured in any other way. The law looks to the effect of such action, or in the absence of proved effects, to the intent, and will not permit the mere form utilized to circumvent the law. Therefore, entirely irrespective of any compulsion or even agreement, the circulation of a blacklist manifestly intended to put the ban upon those whose names appear therein, causing an important body of possible customers to combine with a view to joint action in matters of this kind, is unlawful either if it restrains commerce or if the intent to restrain commerce is shown.[105] Peace-

[103] *Eastern States Retail Lumber Dealers' Assn. vs United States,* 234 U. S. 600 (1914); *Bobbs Merrill & Co. vs Straus (American Publishers' Assn.),* 139 Fed. 155, 175, 178 (1905); *Straus vs American Publishers' Assn.,* 231 U. S. 222, 236 (1913); *United States vs Hollis et al.* (Northwestern Lumbermen's Assn.), 6 Anti-Trust Decisions, 976, 996, for decree, see Decrees and Judgments in Federal Anti-Trust Cases 619, 628 (1917). See also decree, *United States vs National Assn. of Retail Druggists,* Decrees and Judgments in Federal Anti-Trust Cases, 115, 117 (1907); *United States vs Master Horse Shoers' National Protective Assn.,* consent decree, *ibid.,* pp. 388, 391 (1916); *United States vs Pacific Coast Plumbing Supply Assn.,* consent decree, *ibid.,* pp. 323, 327 (1912); *United States vs National Wholesale Jewelers' Assn.,* consent decree, *ibid.,* pp. 509, 523 (1914); *United States vs National Assn. of Master Plumbers,* consent decree, *ibid.,* pp. 603, 613 (1917); *United States vs Hartwick et al.* (National Retail Lumber Dealers' Assn.), consent decree, *ibid.,* pp. 649, 655 (1917); *United States vs Colorado & Wyoming Lumber Dealers' Assn.,* consent decree, *ibid.,* pp. 663, 672 (1917).

[104] *Eastern States Lumber Dealers' Assn. vs United States,* 234 U. S. 600, 614 (1914).

[105] *Lawlor vs Loewe,* 235 U. S. 522, 534 (1915); *Eastern States Retail Lumber Dealers' Assn. vs United States,* 234 U. S. 600 (1914).

ful persuasion is as much within the prohibition of the law as force or threats when the purpose or result accomplished is a restraint of trade.[106] Thus, for example, where the history of the industry and the past efforts of an association show the purpose of its circulation, the mere circulation of a list of names with the mere statement of fact that they are selling direct to consumers, even though there is not even a recommendation of action contained in such circular, will amount to a violation of the law if the natural effect of it will be to cause the parties among whom it is circulated to withhold their patronage from the concern listed.[107] In such a case of concerted action on the part of members of an association the conspiracy to accomplish that which was the natural consequence of such action may be inferred by the courts.[108] The reason for the holding that a black list, for example, of a wholesaler selling direct, by an association of retailers, is unlawful, is because the blacklist tends directly to restrain the freedom of commerce by preventing the blacklisted dealer from entering into competition with retailers, and also directly tends to prevent other dealers who have no personal grievance against him and with whom he might trade, from doing so, solely because of the influence of the blacklist circulated. This takes the blacklist out of the normal and usual agreements in aid of trade and commerce and places it within the prohibited restraints.[109]

Whitelists.—Evidently in a vain hope to circumvent the law applicable to blacklists, some associations have endeavored to accomplish the same result by publishing so-called whitelists, which are lists containing the names of the traders who are "legitimate" and acting in conformity with the trade policies of the association. The obvious purpose and effect of a whitelist is to procure the boycott of parties not listed, and it is, of course, therefore unlawful. Such whitelists usually take the

[106] *Duplex Printing Co. vs Deering et al.*, 254 U. S. 443 (1921).

[107] *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600, 609 (1914).

[108] *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600, 612 (1914).

[109] *Eastern States Retail Lumber Dealers' Assn. vs United States*, 234 U. S. 600, 612 (1914).

form of pamphlets or booklets given such names as "Blue Book," "Brown Book," "Red Book," "Green Book," and so on. Only the names of those parties who adhere to the policies of the association issuing such publications are listed. Their clear purpose and effect is to restrain trade, and they are therefore unlawful.[110] In numerous association cases the circulation of whitelists has been enjoined.[111] The action of a trade association in conspiring or working with the publishers of books designed to establish the credit rating, business standing and classification of dealers whereby the association procures the elimination of dealers whose business does not conform to the standards of classification recognized by the association, is unlawful, for such publications are plainly whitelists.[112] The members of one association were indicted and some of them fined for the circulation among their members of so-called honorary lists of producers, manufacturers and wholesalers who refused to sell to so-called illegitimate dealers who were not members of the association.[113]

Cutting Off Competitors' Supply.—Clearly allied with the

[110] *Knauer vs United States* (National Assn. of Master Plumbers), 237 Fed. 8 (1916); *United States vs Southern Wholesale Grocers' Assn. et al.*, 207 Fed. 434, 439 (1913). But see *Chas. A. Ramsey Co. vs Associated Bill Posters of United States & Canada*, 271 Fed. 140, 141-143 (1921).

[111] *United States vs Hollis et al.* (Northwestern Lumbermen's Assn), Decrees and Judgments in Federal Anti-Trust Cases, 619-627 (1917); *United States vs Southern Wholesale Grocers' Assn.*, consent decree, *ibid.*, pp. 247, 248 (1911); *United States vs Pacific Coast Plumbing Supply Assn.*, consent decree, *ibid.*, pp. 323, 326 (1912); *United States vs Master Horse Shoers' Protective Assn.*, consent decree, *ibid.*, pp. 388, 391 (1916); *United States vs New Departure Mfg. Co.* (Asso. of Coaster Brake Licensees), consent decree, *ibid.*, pp. 471, 474 (1913); *United States vs Hartwick et al.*, consent decree, *ibid.*, pp. 649, 661 (1917); *United States vs Colorado & Wyoming Lumber Dealers' Assn.*, consent decree, *ibid.*, pp. 663, 671 (1917); *United States vs National Wholesale Jewelers' Assn. et al.*, consent decree, *ibid.*, pp. 509, 517, 523 (1914); *United States vs National Assn. of Master Plumbers*, consent decree, *ibid.*, pp. 603, 616 (1917).

[112] *United States vs Hollis et al.* (Northwestern Lumbermen's Assn.), Decrees and Judgments in Federal Anti-Trust Cases, pp. 619, 625, 628 (1917).

[113] *United States vs National Retail Monument Dealers' Assn.*, indictment July 24, 1917, p. 5.

boycott and usually part of a general plan of control of distribution are collective efforts to shut off the supply of competitors. Such action is usually secured by threatening the source of supply with boycotts unless they cease to sell to such competitors. Thus the Bill Posters' Association was enjoined from attempting any measure whatsoever to prevent any person from contracting with any bill posters, whether or not a member of the association, for the posting of advertising matter or posters sent to him, or requiring that solicitors employed by the association should not send business relating to the posting of posters to parties not members of the association, or from endeavoring to induce manufacturers of posters not to sell the same upon equal terms to any person desiring to purchase.[114] In the Eastman Kodak case, the defendant was enjoined from taking action to prevent its competitors from obtaining raw paper stock.[115]

The courts have even enjoined members of trade associations from communicating with manufacturers or others for the purpose of inducing such parties to cut off the source of supply of competitors not members of the association.[116]

Interfering with Labor Supply.—Equally harmful in its effects are efforts on the part of a trade association to interfere with the labor supply of competitors. Among the charges in the indictment under which some members of the Philadelphia Tile, Mantel and Grate Association were prosecuted was the allegation that the defendants entered into a written contract with a union comprising a large majority of the skilled tile setters in Philadelphia and vicinity to the effect that its members would work for the members of the association in preference to non-members and that they also entered into an oral

114 *United States vs Associated Bill Posters & Distributors,* Decrees and Judgment in Federal Anti-Trust Cases, pp. 373, 375, 376.

115 Decrees and Judgments in Federal Anti-Trust Cases, pp. 477, 478 (1916).

116 *United States vs Hollis et al.* (Northwestern Lumbermen's Assn.), Decrees and Judgments in Federal Anti-Trust Cases, pp. 619, 628 (1917); *United States vs Colorado & Wyoming Lumber Dealers' Assn.,* consent decree, *ibid.,* pp. 663, 672 (1917); *United States vs Hartwick et al.* (Lumber Secretaries' Bureau of Information), consent decree, *ibid.,* pp. 649, 662 (1917).

agreement that the members of the union would not set tile for non-members of the association.[117]

In the indictment of members of the Chicago Mantel and Tile Contractors' Association, it was alleged that the defendants by concerted action hindered non-member dealers and contractors in tiles from securing labor essential to their doing business by concertedly inducing the Building Construction Employers' Association of that city not to receive them as members.[118]

Similarly a large number of manufacturers of sash, door and interior finish in Chicago, together with the members of a labor union there located, were indicted, it being alleged that they were obstructing the business of competitors located outside of Chicago by entering into an agreement whereby the manufacturers and contractors agreed to employ only members of the union and the members of the union agreed to refuse to install any such building materials as should be sold by concerns whose plants were located outside the State of Illinois.[119]

Interference with Procurement of Storage Facilities.—It was alleged in another indictment under which one defendant pled guilty and was fined, that the defendants had attempted to prevent their competitors from obtaining storage facilities for their perishable products in order to cause deterioration in the quality of such products sufficient to compel their competitors to sell their products at a loss.[120]

Price Discriminations.—Closely related to the boycott is concerted action by association members to make discriminatory prices to certain traders with the idea of making it more difficult for them to engage in business. The action of an incorporated association in entering into an agreement with the manufacturer representing the largest portion of the supply whereby such members agreed to buy of no other manufacturer except at substantially lower prices, and such manufacturer

[117] *United States vs Belfi et al.*, indictment Dec. 6, 1917, p. 7.

[118] *United States vs Chicago Mosaic & Tiling Co. et al.*, indictment May 5, 1917, p. 7.

[119] Indictment, *United States vs Andrews Lumber & Mill Co. et al.*, Jan. 21, 1921, p. 6.

[120] Indictment, *United States vs Jensen Creamery Co. et al.*, Feb. 24, 1917, p. 18.

agreed to sell to no other dealer except at prices much higher, has been condemned by the courts.[121] Such an agreement necessarily unduly hindered competing manufacturers by stifling the sale of their product except at abnormally low prices, and at the same time hindered the competition of other dealers by making it difficult for them to secure the product except at a greatly enhanced price. Among the charges contained in the indictment against members of the Steamship Freight Brokers' Association and members of the Trans-Atlantic Associated Freight Conference was an alleged agreement to discriminate against freight brokers and forwarders not members of the Steamship Freight Brokers' Association by refusing to pay them any brokerage fee.[122] It may safely be said that any agreement on the part of members of an association to discriminate in price against non-members, or agreements by an association with other organizations to so discriminate, if designed to hamper unduly the competition of non-members is in violation of the law.

Fighting Instruments.—The action of a combination of steamship companies in employing "fighting ships" has been held to be an unfair restraint of trade.[123] These ships were extra vessels put on when a non-member of the organization made lower rates than those quoted by the combination, and ostensibly operated by one of the shipping companies in the combination, but in reality by the combination itself at the same or a lower rate to drive the non-member out of business.

Malicious Litigation.—The systematic institution of legal proceedings in bad faith in order to use the courts as instrumentalities of oppression and thereby eliminate competitors, is unlawful.[124] But even an illegal combination may protect

[121] *Wheeler Stenzel Co. vs National Window Glass Jobbers' Assn.*, 152 Fed. 864 (1907).

[122] *United States vs Walter Moore et al.*, indictment Aug. 30, 1920, p. 8.

[123] *United States vs Hamburg American S. S. Line et al.*, 216 Fed. 971, 973 (1914).

[124] *Patterson vs United States*, 222 Fed. 599, 643 (1915). See also, consent decree, *United States vs Bowser & Co.*, Decrees and Judgments in Federal Anti-Trust Cases, p. 591.

patent rights owned by it by suits for infringement brought in good faith.[125] So also the fact that the party suing may be using some method which violates the anti-trust acts does not preclude him from maintaining a suit brought in good faith for infringement.[126]

Espionage.—The use of detectives or other means of espionage to acquire information as to a competitor's business secrets, such as his source of supply, his sales and his shipments, has been enjoined when a part of a general plan to restrain trade. Thus an injunction was issued against a detective agency as one of the defendants in a proceeding brought against the Northwest Lumbermen's Association, this agency having been employed by the association to secure information regarding so-called irregular shipments by manufacturers and wholesalers direct to the consumer.[127] The members of the National Association of Master Plumbers were likewise enjoined from maintaining a system of espionage over manufacturers and wholesalers, particularly covering sales by manufacturers and wholesalers to consumers or persons not members of the association.[128] In at least two criminal proceedings, members of trade associations have been indicted for the alleged use of espionage methods, designed to secure information as to the source of supply of competitors.[129]

Intimidation and Coercion.—Threats, intimidation or coercion employed to accomplish a trade restraint, whether made

[125] *Virtue vs Creamery Package Co.*, 227 U. S. 8; *Fraser vs Duffey et al.*, 196 Fed. 900, 903.

[126] *Searchlight Gas Co. vs Prest-O-Lite Co.*, 215 Fed. 692, 697 (1914); *Prest-O-Lite Co. vs Davis*, 209 Fed. 917, 919 (1913).

[127] *United States vs Hollis et al.*, Decrees and Judgments in Federal Anti-Trust Cases, pp. 619, 624, 628.

[128] *United States vs National Assn. of Master Plumbers*, consent decree, Decrees and Judgments in Federal Anti-Trust Cases, pp. 603, 612; see also, *United States vs National Cash Register Co.*, consent decree, *ibid.*, pp. 315, 316; *United States vs Burroughs Adding Machine Co.*, *ibid.*, pp. 457, 458.

[129] Indictment, *United States vs Chicago Mosaic Tiling Co. et al.* (Chicago Mantel & Tile Contractors' Assn.); indictment, May 5, 1917, p. 8; *United States vs Belfi et al.* (Philadelphia Tile, Mantel & Grate Assn.), indictment, Dec. 6, 1917, p. 6.

effective in whole or in part by acts, words, or printed matter, are unlawful.[130] The action of an association in endeavoring to compel outside parties to refrain from dealing with parties objectionable to the association is unlawful and no alleged good purpose can make such a restraint legal.[131] In several cases indictments have been returned against parties alleged to have combined to coerce outside parties or members of the association to comply with rules, regulations or so-called trade ethics, designed to prevent competition.[132] The form of coercion is of course immaterial. It may be threat of boycott, threats to drive out of business, threats of physical violence or what not. Whatever form it may take, if its effect is to restrain the trade of competitors it is unlawful; otherwise the law would be rendered impotent.[133]

Misuse of Governmental Agencies.—There have been repeated attempts both during the war and since to utilize governmental agencies for purposes of restraint of trade. In one instance certain officers of an association have been indicted, among other acts, for their alleged action in procuring priority orders from the Interstate Commerce Commission diverting coal from its normal markets into distant sections in order to disrupt the normal distribution of coal and thereby put coal on a "spot" market distribution basis.[134] In another criminal proceeding, a number of parties were indicted, one of the charges being that they tried to influence legislation in certain states in

[130] *Gompers vs Buck Stove & Range Co.*, 221 U. S. 418, 438 (1911); *United States vs Debs et al.*, Decrees and Judgments in Federal Anti-Trust Cases, pp. 14, 15; *United States vs Workingman's Amalgamated Council, ibid.*, p. 9.

[131] *United States vs King et al.*, 229 Fed. 275, 280 (1915) (Aroostook Potato Shippers' Assn). See also, *United States vs Hollis et al.*, Decrees and Judgments in Federal Anti-Trust Cases, p. 627; *United States vs Associated Bill Posters, ibid.*, p. 375.

[132] *United States vs Walter Moore et al.* (Steamship Freight Brokers' Assn.), indictment August 30, 1920, p. 8; *United States vs Jensen Creamery Co. et al.*, indictment Feb. 24, 1917, p. 21; *United States vs W. Hamilton Smith et al.*, indictment March 3, 1921, p. 8.

[133] *Gompers vs Buck Stove & Range Co.*, 221 U. S. 418, 438 (1911).

[134] *United States vs Jones et al.* (National Coal Assn.), indictment Feb. 25, 1921, pp. 27, 36, 45, 54, 62.

their own favor to the injury and detriment of their competitors.[135] While any such instance of restraint of trade is unlawful, some organizations are from time to time, by misrepresentations of fact, procuring governmental action apparently under the mistaken belief that the action being taken by the government, there is no danger of liability on the part of the association or its members for the restraint produced.

It is, of course, impossible to enumerate all collective activities which are in restraint of trade. The forms of voluntary restraints are fairly well defined. The imposition of restraints upon others, however, will constantly take new forms in response to changing conditions. But regardless of the form taken, if they are unfair, if they unduly hinder competitors, they will certainly be in violation either of the anti-trust laws or the Federal Trade Commission Act. It cannot be too strongly emphasized that the Supreme Court of the United States is determined that no subterfuge, no indirection, shall be employed to evade the laws and public policy of our government, which require the maintenance of equal opportunity for all under fair, unrestricted competitive conditions. The great future of our trade associations will be achieved in constructive efforts for the common good, and not in attempted evasions of the law.

[135] *United States vs Jensen Creamery Co.*, indictment Feb. 24, 1917, p. 19.

APPENDICES

A. Sherman Anti-Trust Act: 26 Stat. 209.

B. Clayton Act: 38 Stat. 730.

C. Webb Export Act: 40 Stat. 516.

D. Capper-Volstead Act: Act to authorize association of producers of agricultural products: Feb. 18, 1922.

E. Federal Trade Commission Act: 38 Stat. 717.

F. Title VIII, Unfair Competition: Act of Sept. 8, 1916, Sections 800-803: 39 Stat. 798.

G. Packers and Stockyards Act of 1921: Aug. 15, 1921.

H. Wilson Tariff Act: Sections 73-77: 28 Stat. 570: 37 Stat. 667.

I. Panama Canal Act: Section 11, paragraph 4: 37 Stat. 560.

J. Correspondence between Department of Commerce and Department of Justice upon the activities of trade associations.

APPENDIX A

SHERMAN ANTI-TRUST ACT

[Act of July 2, 1890 (26 Stat., 209).]

AN ACT To protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the Distict of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

APPENDIX B

THE CLAYTON ACT

[Act of October 15, 1914 (38 Stat. 730).]

AN ACT To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "anti-trust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competi-

tion or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations

of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the

company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided,* That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further,* That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further,* That nothing contained in this section

shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Sec. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the

Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to

the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the anti-trust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such persons; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said com-

plaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 12. That any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district: *Provided*, That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United

States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Sec. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to

codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act

or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided,* That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before

such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SEC. 26. If any clause, sentence, pargaraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.

APPENDIX C

WEBB EXPORT ACT

[Act of April 10, 1918 (40 Stat. 516).]

AN ACT To promote export trade, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merechandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

That the words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

That the word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

SEC. 2. That nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further,* "That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

SEC. 3. That nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

SEC. 4. That the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

SEC. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe

that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Approved, April 10, 1918.

APPENDIX D

CAPPER-VOLSTEAD ACT

[Act of February 18, 1922.]

AN ACT To authorize association of producers of agricultural products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in inter-state and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second, That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

SEC. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall

be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

Approved, February 18, 1922.

APPENDIX E

FEDERAL TRADE COMMISSION ACT

[Act of September 26, 1914 (38 Stat. 717).]

AN ACT To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all em-

ployees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock,

except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Anti-trust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, part-

nership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the

commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be

its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the anti-trust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Sec. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

Sec. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to,

for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no

natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless di-

rected by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said anti-trust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

APPENDIX F

ACT OF SEPT. 8, 1916, CH. 463

[39 Stat. 798.]

Title VIII.—Unfair Competition

Sec. 800. That when used in this title, the term "persons" includes partnerships, corporations, and associations.

Sec. 801. That it shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

Sec. 802. That if any article produced in a foreign country is imported into the United States under any agreement, understanding, or condition that the importer thereof or any other person in the United States shall not use, purchase, or deal in, or shall be restricted in his using, purchasing, or dealing in, the articles of any other person, there shall be levied, collected, and paid thereon, in addition to the duty otherwise im-

posed by law, a special duty equal to double the amount of such duty: *Provided,* That the above shall not be interpreted to prevent the establishing in this country on the part of a foreign producer of an exclusive agency for the sale in the United States of the products of said foreign producer or merchant, nor to prevent such exclusive agent from agreeing not to use, purchase, or deal in the article of any other person, but the proviso shall not be construed to exempt from the provisions of this section any article imported by such exclusive agent if such agent is required by the foreign producer or if it is agreed between such agent and such foreign producer that any agreement, understanding or condition set out in this section shall be imposed by such agent upon the sale or other disposition of such article to any person in the United States.

SEC. 803. That the Secretary of the Treasury shall make such rules and regulations as are necessary for the carrying out of the provisions of section eight hundred and two.

APPENDIX G

PACKERS AND STOCKYARDS ACT OF 1921

[Act of Aug. 15, 1921.]

AN ACT To regulate interstate and foreign commerce in live stock, live-stock products, dairy products, poultry, poultry products, and eggs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—DEFINITIONS.

This Act may be cited as the "Packers and Stockyards Act, 1921."

SEC. 2. (a) When used in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and by-products of the slaughtering and meat-packing industry—if edible;

(4) The term "live stock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead;

(5) The term "live-stock products" means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in or in part from live stock; and

(6) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

(b) For the purpose of this Act (but not in any wise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries, whereby live stock, meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for

slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

Title II.—Packers.

Sec. 201. When used in this Act—

The term "packer" means any person engaged in the business (a) of buying live stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing live-stock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing live-stock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) above, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) above, or unless

(3) Any interest in such business of manufacturing or preparing live-stock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) above, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing live-stock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) above.

Sec. 202. It shall be unlawful for any packer to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or buy or otherwise receive from or for any other packer, any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivision (a), (b), (c), (d), or (e).

SEC. 203. (a) Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this title, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may on application be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing the Secretary may amend the complaint; but in case of any amendment adding new charges the hearing shall, on the request of the packer, be adjourned for a period not exceeding fifteen days.

(b) If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture.

(c) Until a transcript of the record in such hearing has been filed in a circuit court of appeals of the United States, as provided in section

204, the Secretary at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the packer to be heard, may amend or set aside the report or order, in whole or in part.

(d) Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

SEC. 204. (a) An order made under section 203 shall be final and conclusive unless within thirty days after service the packer appeals to the circuit court of appeals for the circuit in which he has his principal place of business by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

(b) The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the complaint, the evidence, and the report and order. If before such transcript is filed the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

(c) At any time after such transcript is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the packer and his officers, directors, agents, and employees, from violating any of the provisions of the order pending the final determination of the appeal.

(d) The evidence so taken or admitted, duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way.

(e) The court may affirm, modify, or set aside the order of the Secretary.

(f) If the court determines that the just and proper disposition of the case requires the taking of additional evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

(g) If the circuit court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the

packer, and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified.

(h) The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 240 of the Judicial Code, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the circuit court of appeals, in so far as such decree operates as an injunction, unless so ordered by the Supreme Court.

(i) For the purposes of this title the term "circuit court of appeals," in case the principal place of business of the packer is in the District of Columbia, means the Court of Appeals of the District of Columbia.

SEC. 205. Any packer, or any officer, director, agent, or employee of a packer, who fails to obey any order of the Secretary issued under the provisions of section 203, or such order as modified—

(1) After the expiration of the time allowed for filing a petition in the circuit court of appeals to set aside or modify such order, if no such petition has been filed within such time: or

(2) After the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the circuit court of appeals and no such writ has been applied for within such time; or

(3) After such order, or such order as modified, has been sustained by the courts as provided in section 204: shall on conviction be fined not less than $500 nor more than $10,000, or imprisoned for not less than six months nor more than five years, or both. Each day during which such failure continues shall be deemed a separate offense.

TITLE III.—STOCKYARDS.

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce live stock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce live stock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in

such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part of the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, de-

mand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a coöperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their live stock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

Sec. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

Sec. 308. (a) If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Sec. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the

time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the live-stock commissioner, Board of Agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever,

the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Sec. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of live stock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in live stock on the one hand and interstate or foreign commerce in live stock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in live stock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Sec. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall

cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

TITLE IV.—GENERAL PROVISIONS.

SEC. 401. Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person

do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

SEC. 402. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this Act in any part of the United States.

SEC. 403. When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

SEC. 404. The Secretary may report any violation of this Act to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay.

SEC. 405. Nothing contained in this Act, except as otherwise provided herein, shall be construed—

(a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, the Interstate Commerce Act as amended, the Act entitled "An Act to promote export trade, and for other purposes," approved April 10, 1918, or sections 73 to 77, inclusive, of the Act of August 27, 1894, entitled "An Act to reduce taxation to provide revenue for the Government, and for other purposes," as amended by the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February 12, 1913, or

(b) To alter, modify, or repeal such Acts or any part or parts thereof, or

(c) To prevent or interfere with any investigation, proceeding, or prosecution begun and pending at the time this Act becomes effective.

SEC. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

(b) On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes," approved September 26, 1914, or under section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case.

SEC. 407. The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose.

SEC. 408. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Approved, August 15, 1921.

APPENDIX H

ANTI-TRUST PROVISIONS OF WILSON TARIFF ACT OF AUGUST 27, 1894, AS AMENDED BY THE ACT OF FEBRUARY 12, 1913.

[28 Stat. 570, 37 Stat. 667.]

SEC. 73. That every combination, conspiracy, trust, agreement, or contract, is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

SEC. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they

reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in section seventy-three of this act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX I

PANAMA CANAL ACT

[Act of Aug. 24, 1912 (37 Stat. 560).]

AN ACT To provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone.

. . . . . .

SEC. 11. . . . No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States. . . .

APPENDIX J

CORRESPONDENCE BETWEEN DEPARTMENT OF COMMERCE AND DEPARTMENT OF JUSTICE UPON THE ACTIVITIES OF TRADE ASSOCIATIONS

DEPARTMENT OF COMMERCE
OFFICE OF THE SECRETARY
WASHINGTON

February 3, 1922.

My dear Mr. Attorney General:

The situation regarding the activities of legitimate trade associations is more disturbing now than at any time since we first discussed the matter, and since Mr. Lamb was advised by Colonel Goff and Mr. Fowler that it was your desire that I present an informal, inter-departmental inquiry regarding the present status of the law relating to legitimate trade associations and the extent that they may engage in legitimate coöperative activities, I have made a further survey of the matter, and the questions hereinafter presented seem to me to be vital to trade associations based on present information secured through recent investigation.

It may not be out of place to call your attention to the organic act which created the Department of Commerce, which imposed upon the Department the duty "to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and the transportation facilities of the United States." In obeying the commands of the statute, it seemed to me that the Department should employ all available legal means to get into the closest possible touch with industry in all its forms and secure the best information possible regarding the needs and necessities of trade and commerce. If the Department has to help, aid, and assist industry, it must, of course, be conversant with the facts and conditions influencing the carrying on of trade. The existence of a large number of trade associations being well known prompted me to make inquiry regarding their forms of organization and the functions they were performing to ascertain whether or not they could be utilized as a means for securing trade information that would properly aid the Department in performing its duties. My inquiry into the affairs of trade associations was not with the idea of creating a new scheme for carrying on business, but solely for the purpose of ascertaining whether or not they could properly be utilized in furnishing information that would not only be helpful to the Department and to the commercial world but to the public generally, always keeping in mind that whatever activities were carried on by such associations, they should of necessity be

within the terms of existing law. In the course of my inquiry, I discovered that certain trade associations were involved in litigation which questioned the legality of their performances, and, by reason of the litigation, there was much doubt and confusion regarding the legal limits within which trade associations could properly operate. This situation seemed to call for conferences with your Department, which you have graciously afforded, and although no definite determination has heretofore been reached regarding the policy to be pursued, I realize the difficulties that confront you in attempting to reach a proper conclusion, and while a public announcement from you would have been most helpful to all, I most heartily acquiesce in your suggestion that the matter be presented as an informal, interdepartmental inquiry for my guidance in performing the duties imposed upon me by the organic act creating this Department.

So much has been said in the various conferences, coupled with lapse of time, in order to obviate excusable failures in memory as to the matters that have heretofore been discussed and to make clear the position and views of this Department, I desire to offer some preliminary observations regarding trade associations before asking the specific questions heretofore set forth in various informal memoranda and upon which I desire the informal expression of your views.

Commercial progress in industry has always been measured by the advance in knowledge of those engaged in industry. It is impossible for men to acquire or secure all possible knowledge at one time. Its acquisition is a growth resulting from continuous, intelligent inquiry. The knowledge of an industry that is necessary and essential to its success must embrace all facts and circumstances that will in any way influence that industry. These facts and circumstances must include economic conditions as well as scientific facts to the extent that science is called into play in its operation and all commercial conditions that make for efficient production, merchandising, and distribution. No one will dispute the foregoing statements; they are fundamental and necessary to the life of trade and commerce.

The difficulty seems to lie in the determination of the means and methods that may be adopted to secure this necessary information. Little, if any, trouble is experienced in securing the admission that an individual may secure knowledge of these facts by any means that would not constitute an individual crime, and that he may use the information in such manner as his best judgment may tell him will bring him the greatest benefit.

But when two individuals engaged in the same line of industry undertake to provide a means for securing facts necessary and essential to the economic and efficient conduct of their respective organizations, this form of endeavor seems to at once assume an aspect of difficulty that, in my judgment, is in no way justified by a proper consideration of the underlying necessities therefor.

The individual sets up some form of instrumentality to secure the information without which, in the management of his business, he would be

groping in the dark. His competitor across the street does the same thing, and each, securing his information in his own way, uses it as he sees fit, and the action of either one has not offended the majesty of the law. Yet, if the two seek to join the instrumentality each has used for information purposes and the same information is received through one instrumentality and the information given to each and it is used in the same way that it was before, it is suggested that the collective activity in the use of the consolidated instrumentality should not be permitted because of the greater ease and facility thereby afforded for the two individuals to make improper use of the information so acquired. In other words, the objection does not go to the instrumentality, but to the abuse of the information that may be secured through the collective means.

The principle is the same whether two or two hundred join together in securing the information.

No form of legislation has ever yet been devised, nor has man, with all of his genius for invention, even been able to devise a rule or regulation that would prevent men from committing crimes if they are so minded. The best that can be done is to forbid the doing of certain acts or to command the doing of others, prescribing proper punishments in the case of the commission on the one hand and the omission on the other; and when legislation takes that form, rules and regulations and administrative constructions which have for their objective the making of the prohibited thing more difficult will always include within their terms the law-abiding citizen as well as the prospective criminal.

We have had criminals since the beginning of time, and human nature can not be changed by legislation. The criminally inclined represent a small minority, and it may be said in a general way that, excepting offenses against persons and property, most of the criminal statutes regulating trade and commerce and forbidding acts that seem against sound public policy have been made necessary for the control of the minority. None of these statutes, however, has undertaken to prevent the doing of a thing that would result in benefit to the public, but the restriction has been against the doing of the thing in an unlawful way. These statutes have not condemned lawful institutions or instrumentalities for the carrying on of commerce merely because someone might possibly abuse their use. The laws have condemned the abuse, and punishments have been prescribed for those who may be found guilty of the abuse. Therefore, the fact that the minority may be known to violate given laws does not establish a principle that the primary means, lawful in itself, which they have adopted for the purpose of performing the unlawful acts, should be entirely abolished and its use forbidden by law-abiding citizens. Each unlawful use of the means is merely an individual case of the violation of a law.

Trade associations have been in existence for many years. The great majority are legitimate, both in form of organization and in activity. The minority, while lawfully organized under articles expressing lawful

purposes, may engage in activities that are evidence of purpose contrary to and outside of the declared purposes in the articles of organization.

Again, a trade association may have lawful form of organization and the activities of its officers may be clearly within the purposes declared in the association charter, and yet members of the organization may, by unlawful confederation, use the information lawfully secured for unlawful purposes. It may, therefore, truthfully be said that the line dividing the good association and the bad, the proper activity from the improper one, and the lawful activities of the officers of an association from the unlawful acts of the membership, can not be determined, in every instance, with singular ease. It is my belief, however, that it is more easy to determine the forms of organizations and activities that are generally recognized as good than to determine in advance those that may be bad, because in the latter instance, the peculiar facts relating to each association the subject of inquiry may determine whether the organization or its members are operating in violation of law.

It is with much earnestness that I claim there is propriety, generally speaking, in trade associations. Their lawful field of endeavor is large, and their activities work for promotion and advancement of the public welfare and for progressive economic organization. In making this statement, I am not unmindful of the fact that the impression exists with a small minority that individual prohibited acts may be accomplished by organization under the disguise of a trade association. However, to make my position clear regarding the trade associations, the existence of which I advocate, I desire to say that I have always taken the view that no body of men could combine in the form of a trade organization and do any act or thing forbidden by law if they were undertaken by them outside of a trade organization. The character of trade organization the existence of which should be preserved is one that carries lawful purposes only in its articles of association; its activities must be in harmony with its declared purposes. The articles of association, with their lawful, declared purposes, must not be used as a mask to hide unlawful purposes. In other words, the organization can not be used to conceal or disguise any contract, combination, conspiracy, agreement, or understanding, secret or otherwise, on the part of the officers of the organization or on the part of the membership or any part thereof to engage in activities in restraint of trade or otherwise in violation of the anti-trust laws.

There has been much information collected by legitimate trade associations in which the general public has no interest whatsoever, yet information of this class has always been freely offered to the daily and the trade press, as well as to any governmental agency that might desire the information as a matter of statistical record. On the other hand, certain statistical data are collected by trade organizations that would be of vast value to the public generally if published in practical, available form.

Many of the trade associations securing and disseminating the statistical data mentioned have restricted the same to its membership, while

others have undertaken to give the same to the public through the daily and the trade press concurrently with its members. The trade associations of the latter class are in the minority.

Information lawfully secured regarding trade and economic conditions made public for the information of everyone can not be harmful. Information secured solely for the benefit of members and of a character that puts the membership, by reason of the information, in a position of advantage as compared with the public without such information can not be sanctioned by sound public policy. The act of securing the information and the use of it by the members of a particular organization may be perfectly lawful in itself, but it is my belief that good morals and a sense of fair dealing require the giving of the information secured in this collective manner to the public generally, to the end that all persons engaged in commercial transactions involving the information in question will be on an even footing.

The activities of trade associations that have received the greatest criticism involve the collection of statistics relating to volume of production, capacity to produce by districts of production, wages, consumption of products in domestic and foreign trade, distribution thereof including volume of distribution by districts, together with figures as to stocks on hand, wholesale and retail, by districts, coupled with information as to price, either in the form of individual reports of each member distributed to every other member or the individual prices reported to the association and by the latter compiled and averaged by districts for certain specified periods.

If information regarding production, capacity, and distribution by districts, with average prices for grades, brands, sizes, styles, or qualities sold in the respective districts for specified periods of time could be given to the public at the same time that such information is available to the members of an association, in my judgment, great public good would result. With this information available, everyone dealing in the products of a given industry, whether buyer or seller, would have the same information regarding conditions and, in dealing with one another, would have knowledge of the same facts upon which to form their judgments as to the proper course to pursue.

A majority of the associations collecting data of the nature indicated have distributed same only to members of the association, while others have undertaken to give the information to the public through the daily and trade papers. Publication of the information by these associations in the daily press has not been general, and its availability to the public has been largely through the medium of trade papers, and through the daily press to the extent that the latter may have been utilized. When published through trade papers this information should be released to members only after such publication.

It should be borne in mind that the criticism aimed at this form of activity has not involved the instrumentality for securing it or the sub-

ject matter of the information, but has been directed to the use or possible use that might be made of the information and the fact that no means existed for distributing the information to the public at the same time that it was received by the members of the association. These observations likewise apply to the criticisms directed to the furnishing of average price of given commodities according to grade, size, brand, or quality by districts for specified periods of time, based on past and closed transactions.

With these observations, which have been extended at greater length than I intended, I desire the informal expression of your views as to the following activities on the part of trade associations and their members wherein neither the form of the association nor the activity, which appear perfectly fair and lawful on the surface, is used to hide or conceal some contract, combination, conspiracy, agreement, or understanding, secret or otherwise, on the part of the association, the membership, or any part thereof to actually restrain trade or otherwise violate the Sherman Act:

(1) May a trade association provide for its members a standard or uniform system of cost accounting and recommend its use, provided that the costs so arrived at by the uniform method are not furnished by the members to each other or by the members to the association and by the latter to the individual members?

(2) May a trade association advocate and provide for uniformity in the use of trade phrases and trade names by its respective members for the purpose of ending confusion in trade expressions and for harmony of construction as to the meaning of trade phrases, names, and terms?

(3) May a trade association, in coöperation with its members, advocate and provide for the standardization of quality and grades of product of such members, to the end that the buying public may know what it is to receive when a particular grade or quality is specified; and may such association, after standardizing quality and grade, provide standard form of contract for the purpose of correctly designating the standards of quality and grades of product; and may it standardize technical and scientific terms, its processes in production, and its machinery; and may the association coöperate with its members in determining means for the elimination of wasteful processes in production and distribution and for the raising of ethical standards in trade for the prevention of dishonest practices?

(4) May a trade association collect credit information as to the financial responsibility, business reputation, and standing of those using the products of the industry; and may the association furnish such information to individual members upon request therefor, provided such information is not used by the association or the members for the purpose of unlawfully establishing so-called "blacklists?"

(5) May a trade association arrange for the handling of the insurance of its members, including fire, industrial, indemnity, or group insurance? In other words, can the members of an industry, through the agency of a trade association, arrange for or place all of the insurance of the members?

(6) May a trade association, in coöperation with its members, engage

in coöperative advertising for the promotion of trade of the members of that association engaged in the particular industry; and may the association engage in such form of promotion by furnishing trade labels, designs, and trade-marks for the use of its individual members?

(7) May a trade association, for and in behalf of its members, engage in the promotion of welfare work in the plants or organizations of its members, which welfare work includes sick benefits and unemployment insurance for employees, uniform arrangements for apprenticeship in trade education, the prevention of accident and the establishment of an employment department or bureau for coöperation with employees?

(8) May a trade association, in coöperation with its members and acting for and in behalf of its members, handle all legislative questions that may affect the particular industry, regarding factories, trades, tariff, taxes, transportation, employers' liability and workmen's compensation, as well as the handling of rate litigation and railroad transportation questions?

(9) May a trade association, in coöperation with its members and acting for and in their behalf undertake the promotion of closer relations between the particular industry and the federal and the state departments of government which may have administration of laws affecting the particular industry in any form?

(10)—A. May a trade association collect statistics from each member showing his volume of production, his capacity to produce, the wages paid, the consumption of his product in domestic or foreign trade, and his distribution thereof, specifying the volume of distribution by districts, together with his stock, wholesale or retail?

B. And may such trade association, on receipt of the individual reports of each member, compile the information in each report into a consolidated statement which shows the total volume of production of the membership, its capacity to produce by districts of production, which, in some instances, include a state or less area, the wages by districts of production, the consumption in foreign or domestic trade by districts, the volume of distribution by districts, and the stocks on hand, wholesale and retail, by districts?

C. And if, after compiling the information as aforesaid, the information received from the members as well as the combined information is not given by the association to any other person, may it then file the combined statement with the Secretary of Commerce for distribution by him to the members of the association through the public press or otherwise and to the public generally and to all persons who may be in any way interested in the product of the industry, it being understood that the individual reports for the members should cover either weekly, monthly, quarterly, or longer periods as may be deemed desirable by the members, and, when a period is adopted, the report for each member shall cover that period, and the combined report shall be for that period?

(11)—A. May a trade association, at the time it collects the pro-

duction and distribution statistics above outlined, at the same time have their members report the prices they have received for the products they have sold during the period taken, specifying the volume of each grade, brand, size, style, or quality, as the case may be, and the price received for the volume so sold in each of the respective districts where the product is sold?

B. And may the association, without making known to any person the individual price reports of any member, consolidate all of the reports into one, and show the average price received for the total volume of each, grade, brand, size, style, or quality, as the case may be, distributed in each district covered by the distribution statistics for the period covered by each individual report?

C. And may the association, after making such compilation, send the compiled report as to average price, as aforesaid, to the Secretary of Commerce, to be by him distributed to the public and to any or all persons who may be interested in the particular industry making the reports?

In order to avoid repeating this question in connection with each one of the activities outlined in the eleven preceding questions, may trade associations engage in any or all of the activities named without violating the law, provided the organization and the activity engaged in are not for the purpose of hiding or concealing some agreement, contract, etc., to actually restrain trade or otherwise violate the anti-trust laws?

As stated in the beginning, I do not ask you to express your views in a formal opinion, but it is my hope that you may see your way clear to give me the advice that will enable me to adopt the proper administrative action in undertaking the duties imposed upon the Secretary of Commerce by the organic act creating the Department. It is unnecessary for me to say that the general, unsettled condition regarding the proper provinces of trade associations justifies as early a reply to these inquiries as your other numerous official duties will permit.

Yours faithfully,

HERBERT HOOVER,
Secretary of Commerce.

Honorable Harry M. Daugherty,
Attorney General,
Department of Justice,
Washington, D. C.

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

February 8, 1922.

My dear Mr. Secretary:

Your communication of the 3rd instant relating to the practices in which trade associations may lawfully engage was received. I recognize

the force of your able discussion of the subject, and after careful consideration of the several activities which you suggest can be exercised lawfully, I beg to say:

With reference to the first paragraph, there is no apparent objection to a standard system of cost accounting, but I think associations should be warned to guard against uniform cost as to any item of expense. For illustration, a strong effort has been made by some lumber associations to take as a basis for estimating costs of production a uniform charge for stumpage. Of course the cost of the timber in the tree to the different manufacturers who own their timber in the woods greatly varies; and as to each it should be charged at its actual cost. It is as clearly a violation of the law to agree upon the cost of an item that constitutes a substantial part of the total cost price when its cost actually varies, as to agree upon the sales price, because the sales price is substantially affected by such agreement. It has been ascertained that the members of one association go so far as to fix a uniform cost price, leaving to each member to determine what per cent profit he will add, thus eliminating entirely competition in so far as affected by the cost of production.

Furthermore, I have serious doubts about the advisability of the latter part of the sixth paragraph. I can see no objection to coöperative advertising designed to extend the markets of the particular article produced or handled by the members of an association, but when the several producers or dealers use uniform trade labels, designs and trade-marks it seems to me the inevitable result would be a uniformity of price. Where two competing articles are advertised in precisely the same way and bear exactly the same label or trade-mark, it certainly would be difficult for one to be sold at a higher price than the other, although its quality may be superior. In a way this is illustrated in the cement industry. There a standard of quality has been adopted. That is, it is necessary for all cement to comply with a certain standard, but in practice no manufacturer undertakes to make, or at least no one advertises that he does make, a grade of cement superior to that standard. The result is that there is no competition in the sale of cement so far as quality is concerned. It seems to me therefore that it would be well to eliminate the latter clause in paragraph six, to wit, "and may the association engage in such form of promotion by furnishing trade labels, designs and trade-marks for the use of its individual members?"

I can now see nothing illegal in the exercise of the other activities mentioned, *provided always* that whatever is done is not used as a scheme or device to curtail production or enhance prices, and does not have the effect of suppressing competition. It is impossible to determine in advance just what the effect of a plan when put into actual operation may be. This is especially true with reference to trade associations, whose members are vitally interested in advancing or, as they term it, stabilizing prices, and who through the medium of the associations are brought into personal contact with each other. Therefore the expression of the view that the

things enumerated by you, with the exceptions stated, may be done lawfully is only tentative; and if in the actual practice of any of them it shall develop that competition is suppressed or prices are materially enhanced, this Department must treat such a practice as it treats any other one which is violative of the Anti-Trust Act.

Yours sincerely,

H. M. Daugherty,

Attorney General.

Hon. Herbert Hoover,
Secretary of Commerce,
Washington, D. C.

DEPARTMENT OF COMMERCE

OFFICE OF THE SECRETARY

WASHINGTON

February 9, 1922.

My dear Mr. Attorney General:

I have your letter of the eighth instant, in reply to my letter to you of February 3, 1922, in which I made informal inquiry as to the legality of certain activities of trade associations enumerated in eleven questions. It is very pleasing to me to note that our views regarding these matters are in such close harmony.

Your observations regarding the last clause in question (6) in my letter are wholly sound, based on the language of that clause. It was not, however, my idea that each constituent member of a trade association would use a community trade-mark on his product, i.e., the same trade-mark that was used by every other member of the association, and, therefore, the last clause in that question was unhappily worded. The question really relates to trade promotion through coöperative advertising, in which certain trade slogans are used, such as, "Made in Grand Rapids," which was adopted by the furniture manufacturers at that furniture center. Generally, activities covered in question (6) are conducted by a trade association in a given local community. An organization at Chicago advertises for its entire membership, which includes every line of commercial endeavor in Chicago, that the City is the great central market. It is coöperative advertising of this class that tends to promote trade extension in given lines or collected lines of industry. Certain of the trade associations, however, do devise trade-marks, not for use by all members but for individual members. It is a well-known fact that when some manufacturer or producer is fortunate enough to select a trade-mark that appeals to the public, it becomes a great aid in selling his commodity and, as a result, it is well advertised until it becomes a household word. Other producers

or manufacturers of the same kind of an article, in order to take advantage of this situation, will devise a trade-name or trade-mark as near to that of the successful competitor as he thinks he can go and still escape suit under the trade-mark or unfair competition laws. The activities of a trade association regarding trade-marks to which I referred in my letter of the third relate to the straightening out of instances of unfair competition or infringement as between the members by undertaking to design trade-marks for the individual members of the association making the same product that would absolutely prevent confusion on the part of the public as to the producer or manufacturer of the given article and, at the same time, remove all claim of infringement or unfair competition. In other words, the trade-mark activity referred to was that of making the trade-marks of each individual member distinctive instead of common. You may, therefore, consider the part of my question (6) referred to in your letter as eliminated from the question, and that the question was really intended to cover the matters stated herein. With this explanation, I feel sure you will agree with me that our views on the matters presented are in complete accord.

Yours faithfully,

HERBERT HOOVER,
Secretary of Commerce.

Honorable Harry M. Daugherty,
Attorney General,
Department of Justice,
Washington, D. C.

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

February 9, 1922.

My dear Mr. Secretary:

Your letter of the 9th instant relating to paragraph six of the questions you had previously propounded with reference to the activities of trade associations was duly received, and in reply thereto I will say:

Not being familiar with the practices of such associations in respect to trade-names, trade-marks, labels, etc., I did not clearly understand the meaning of the latter clause of paragraph six, and your explanation places the matter in a somewhat different light. However, I hardly feel that I can express assent to the adoption of a rule by a trade association or to its membership's engaging in a practice whereby the difference between trade-names, trade-marks, labels, etc., used by the different members of an association and questions of unfair practices arising out of such use may be determined by the association or a body constituted by it, and a resort to the courts by those believing themselves aggrieved for the determination

of such questions of unfair practices, be prevented. It seems to me that if it were recognized that associations could exercise such a power a door would be opened for the adoption of many schemes the use of which might result in the regulation of prices and the suppression of competition. The principles adopted by the courts with reference to such practices are well defined and the courts are open at all times for the redress of such injuries, while an association has no fixed principle for its guidance, and it would be inclined to take such action as would best conserve the interests of the several members.

However, I can see no objection whatever to coöperative advertising by community trade-marks or trade-names as illustrated in your communication.

Yours very sincerely,

H. M. Daugherty,
Attorney General.

Honorable Herbert Hoover,
Secretary of Commerce,
Washington, D. C.

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